# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1910.

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## No. 281.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN McMULLEN, AND JOSEPH A. STULZ, AS ADMINISTRATOR WITH THE WILL ANNEXED OF THE ESTATE OF R. PERCY WRIGHT, DECEASED.

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IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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a United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN and JOSEPH A. STULZ, as administrator with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN error.

No. 1642.

*Printed transcript of record.*

Upon writ of error to the United States Circuit Court for the Northern District of California.

Filed Sept. 29, 1908. Frank D. Monckton, clerk.

1 *Names and addresses of attorneys of record.*

Burke Corbet, 704 Market street, San Francisco, California, attorney for John McMullen, plaintiff in error and one of the defendants; and Edward J. Lynch, Mills Building, San Francisco, California, attorney for Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, plaintiff in error and one of the defendants.

Robert T. Devlin, San Francisco, California, United States attorney for the Northern District of California; and George Clark, San Francisco, California, assistant United States attorney for the Northern District of California, attorneys for the defendant in error and plaintiff.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN, and R. Percy Wright, defendants.

2 *Complaint.*

The plaintiffs above named, by Marshall B. Woodworth, their attorney for the Northern District of California, complaining of the defendants above named, allege on information and belief, as follows:

First. That at all times hereinafter mentioned, the defendant, New York Dredging Company, was and is a corporation organized and existing under the laws of the State of New York, and having an office for the transaction of business in the Southern District of New York.

Second. That on or about September 14, 1897, the Chief of the Bureau of Yards and Docks, acting for and on behalf of the Navy Department of the United States, advertised for sealed proposals for dredging the channel in front of the United States Naval Station, Port Royal, South Carolina, a copy of which advertisement is hereto annexed, marked "Exhibit A," and made a part of this complaint.

Third. That in response to said advertisement the defendant, New York Dredging Company, on October 4, 1897, made an offer to the said Navy Department, of which a copy is hereto annexed, marked "Exhibit B," and made a part of this complaint. That the said offer was made subject to all the requirements of the said advertisement and of certain specifications, instructions, and plans mentioned in said advertisement, which are hereafter referred to more specifically.

3 Fourth. That the offer of said defendant, New York Dredging Company, was duly accepted by the Chief of the Bureau of Yards and Docks, acting for and on behalf of the Navy Department of the United States, and that pursuant to such acceptance the defendant, New York Dredging Company, as principal, and the defendants, John McMullen and R. Percy Wright, as sureties, entered into a certain contract in writing, dated October 25, 1897, by which said contract the said defendant, New York Dredging Company, agreed to execute certain work of dredging at the United States Naval Station, Port Royal, South Carolina, in accordance with the conditions and requirements of the plans and specifications, which said plans and specifications were made part of the said contract in writing, dated October 25, 1897, and together with said contract are hereto annexed, marked "Exhibit C," and made part of this complaint.

Fifth. That the defendant, New York Dredging Company, failed, refused, and neglected to perform the covenants and conditions in the contract agreed by them to be performed.

Sixth. That availing himself of the terms of the said contract dated October 25, 1897, as aforesaid, by and between the said New York Dredging Company and the Chief of the Bureau of Yards and Docks of the United States Navy Department, the Secretary of the Navy did declare the said contract with the said New York Dredging Company abrogated, null, and void, for the following reasons, to wit, because the said New York Dredging Company did not fulfill the terms and conditions by the said New York Dredging Company agreed to be performed.

4 Seventh. That the said Secretary of the Navy, after the abrogation of the said contract, did, in pursuance of law, advertise for proposals to complete the said work of dredging which the said New York Dredging Company failed to complete in accordance with the contract, plans, and specifications already referred to, marked "Plaintiff's Exhibit C," and made part of this complaint.

Eighth. That on or about May 21, 1901, P. Sanford Ross entered into a certain contract or agreement, in writing, with the Chief of

the Bureau of Yards and Docks of the United States Navy Department, acting under the direction of the Secretary of the Navy, by the terms of which contract or agreement the said P. Sanford Ross was to perform certain work, labor, and services in the completion of the said work of dredging, which said work was left uncompleted by the said New York Dredging Company aforesaid, a copy of which contract, together with the plans and specifications accompanying the same, is hereto annexed, marked "Exhibit D," and made part of this complaint.

That the said P. Sanford Ross performed all the covenants and conditions in said contract agreed by him to be performed, completed the said work of dredging, and was paid therefor.

Ninth. That the plaintiffs have performed all the conditions agreed by them to be performed.

Tenth. That on or about October 25, 1897, simultaneously with the execution of the above-mentioned contract, "Exhibit C,"
5 by and between the defendant, New York Dredging Company, and the Chief of the Bureau of Yards and Docks of the United States Navy Department, the said New York Dredging Company, agreeably to law and the Revised Statutes of the United States in such case made and provided, and the defendant, John McMullen, and the defendant, R. Percy Wright, severally duly executed their, and each of their, joint and several writing obligatory or bond, a copy of which is hereto annexed, marked "Plaintiff's Exhibit E," and made part of this complaint.

Eleventh. That, as aforesaid, the defendant, New York Dredging Company, has failed, neglected, and refused to perform the terms and conditions of the contract agreed by them to be performed, whereby the plaintiffs herein were injured to their harm and damage in the sum of fifty-seven thousand three hundred and thirty-eight and 02/100 ($57,338.02) dollars, of which sum twenty-five thousand five hundred and eighty-eight 02/100 ($25,588.02) dollars represents the difference between what the defendant, New York Dredging Company, agreed to perform the work of dredging for and what it actually cost these plaintiffs to complete the said work under the contract with P. Sanford Ross, and of a further sum of thirty-one thousand seven hundred and fifty ($31,750) dollars, being liquidated damages provided for by the contract and accruing under the same, making in all the sum, as aforesaid, of $57,338.02.

Twelfth. That demand in writing has been made upon said bounden defendants, New York Dredging Company, as prin-
6 cipal, for the said sum of fifty-seven thousand three hundred and thirty-eight 02/100 dollars ($57,338.02), and a like demand upon the defendants, John McMullen and R. Percy Wright, as sureties, for the payment of the said sum of fifty-seven thousand three hundred and thirty-eight 02/100 ($57,338.02) dollars, but the same has been refused, and no part or portion thereof has been paid.

Wherefore plaintiffs demand judgment against the defendant, New York Dredging Company, as principal, and against the defend-

ants, John McMullen and R. Percy Wright, as sureties, and each of them, in the sum of fifty-seven thousand three hundred and thirty-eight 02/100 ($57,338.02), with interest thereon from February 25, 1903, together with the costs of this action.

MARSHALL B. WOODWORTH,
*United States Attorney.*

EDWARD J. BANNING,
*Asst. U. S. Attorney.*

STATE OF CALIFORNIA,
*Northern District of California, ss:*

Edward J. Banning, being first duly sworn, deposes and says that he is an assistant United States attorney for the Northern District of California; that he has read the foregoing complaint and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true; that the reason
7 this verification is not made by the plaintiffs is that they are a corporation sovereign; that the source of deponent's information and belief as to all matters not stated upon deponent's knowledge is based upon official documents and records on file in the office of the Navy Department of the United States.

EDWARD J. BANNING.

Subscribed and sworn to before me this 5th day of December, A. D. 1903.

[SEAL.] W. B. BEAIZLEY,
*Deputy Clerk U. S. Circuit Court,*
*Northern District of California.*

EXHIBIT A (TO COMPLAINT).

Sealed proposals, in duplicate, endorsed "Proposals for dredging channel," at U. S. Naval Station, Port Royal, S. C., with be received at this bureau until 1 o'clock p. m., on Tuesday, October 5, 1897, and publicly opened immediately thereafter. Specifications and blank forms of proposals will be forwarded upon application to the bureau or the commandant of the Naval Station, Port Royal, S. C. Bidders are expected to fully inform themselves of the character of the work required by visiting the naval station, where plans may be examined, and, if necessary, there obtained.

E. O. MATTHEWS,
*Chief of Bureau.*

SEPT. 14, 1897.

8 EXHIBIT B (TO COMPLAINT).

(NOTE.—This offer and all papers and exhibits submitted herewith must be in duplicate.)

(Offer.)

NAVY DEPARTMENT,
BUREAU OF YARDS AND DOCKS,
*Oct. 4th, 1897.*

The undersigned, New York Dredging Co., a _____ (Citizen, partnership, or corporation.) _____ (City or town.) of New York, in the State of New York, hereby offers to furnish, under your advertisement dated Sept. 14th, 1897, and subject to all the requirements of the same, and of the specifications, instructions, and plans to which it refers, as follows:

Item 1. Fifteen (15) cents per cubic yard.
Item 2. Ninety-nine (99) cents per cubic yard.
Item 3. Fifteen (15) cents per cubic yard.
Item 4. Ninety-nine (99) cents per cubic yard.

amounting to _____

Should our offer be accepted, we request the contract may be prepared and sent to World Building, New York, for signatures and certificate.

And we hereby declare that the above offer is made in strict conformity, in every particular, with the law approved March 3, 1863, section 2, herein quoted.

EXTRACTS FROM LAWS OF THE UNITED STATES.

9 SEC. 2. And be it further resolved, That the chief of any bureau of the Navy Department, in contracting for naval supplies, shall be at liberty to reject the offer of any person who, as principal or surety, has been a defaulter in any previous contract with the Navy Department; nor shall parties who have failed as principals or sureties in any former contract be received as sureties on other contracts; nor shall the copartners of any firm be received as sureties for such firm or for each other; nor, in contracts with the same bureau, shall one contractor be received as surety for another; and every contract shall require the delivery of a specified quantity, and no bids having nominal or fictitious prices shall be considered. That if more than one bid be offered by any one party, by or in the name of his or their clerk, partner, or other person, all such bids may be rejected, and no person shall be received as a contractor who is not a manufacturer of, or regular dealer in, the articles which he offers to supply, who has not a license as such manufacturer or dealer. And all persons offering bids shall have the right to be present when the bids are opened and inspect the same. [Approved March 3, 1863.]

SEC. 7. And be it further enacted, That section 2 of joint resolution "authorizing the Secretary of the Navy to adjust the equitable claims of contractors for naval supplies and regulating contracts with the Navy Department," approved March 3, eighteen hundred and sixty-three, be, and the same is hereby, amended by adding to

the same the following proviso, viz: Provided, That where articles are advertised and bid for in classes, and, in the judgment of the head of the department, any one or more articles appear to be bid for at excessive or unreasonable prices, exceeding ten per centum above their fair market value, he shall be authorized to reject such bid. [Approved July 4, 1864.]

SEC. 14. And be it further enacted, That no contract or order, or any interest therein, shall be transferred by the party or parties to whom such contract or order may be given to any other party or parties, and that any such transfer shall cause the annulment of the contract or order transferred so far as the United States are concerned: Provided, That all rights of action are hereby reserved to the United States for any breach of such contract by the contracting party or parties. [Approved July 17, 1862.]

N. Y., Oct. 4, 1897.

NEW YORK DREDGING CO. [L. S.]
By GEO. W. CATT, *Prest.*

Witness:
Attest: O. L. WILLIAMS, *Secy.*

EXHIBIT C (TO COMPLAINT).

This contract of two parts, made and concluded this twenty-fifth day of October, A. D. 1897, by and between the New York Dredging Company, by Geo. W. Catt, president, of New York, N. Y., as principal, and John McMullen, and R. Percy Wright, both of the city and county of San Francisco, State of California, as sureties, parties of the first part, and the United States by E. O. Matthews (Chief of the Bureau of Yards and Docks), acting under the direction of the Secretary of the Navy, party of the second part, witnesseth, that for and in consideration of the payments hereinafter specified the parties of the first part, for themselves and their personal and legal representatives, do hereby covenant and agree to and with the party of the second part, as follows, viz:

That they, the said parties of the first part, will provide, furnish, and deliver, at their own risk and expense, at such place or places at the U. S. Navy Station, Port Royal, South Carolina, within 16 calendar months from the date of this contract, all the necessary materials and labor, tools, and appliances for the construction and completion, in all respects, of the dredging at said naval station, in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto, and which form a part of this contract, for the sum of fifteen cents per cubic yard for items 1 and 3, and ninety-nine cents per cubic yard for items 2 and 4, respectively, under paragraph 32 of the specifications above referred to.

It is hereby mutually and expressly covenanted and agreed, and this contract is upon the express condition that no Member of or Delegate to Congres, nor any officer of the United States, naval, mili-

tary, or civil, is, or shall be, admitted to any share or part of this contract or to any benefit to arise therefrom: that any transfer of this contract, or of any interest therein, to any other person or party
12 than said parties of the first part shall annul this contract so far as the United States are concerned; and that if said parties of the first part shall fail in any respect to perform this contract on their part, it may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults herein, or violations hereof; and that for such default the United States may demand and recover of said parties of the first part and their representatives aforesaid, as liquidated damages, a sum of money equal to the penalty of the bond forming part of this contract.

And it is further agreed by the parties of the first part that they will protect and defend the party of the second part in the full and free use and enjoyment of any and all patent rights to any invention, machine, or device which may be applied as a part of the work herein specified and contracted for, either in its construction or use after completion, against the demands of all persons whomsoever.

And it is further agreed that if during the progress of the work it shall be deemed by the Government necessary or desirable to make any changes or modifications in the plans and specifications affecting the cost, said changes or modifications, and the increased or diminished compensation to be paid the contractor, must be agreed to in writing by the parties to the contract before the same is begun; and such increased or diminished compensation, based upon the actual cost, and when exceeding $300, shall be assessed by a board of naval officers, appointed for the purpose.

13 And this contract further witnesseth, that the United States, party of the second part, in consideration of the foregoing stipulation, do hereby covenant and agree to and with the parties of the first part and their said representatives as follows, viz:

That for and in consideration of the faithful performance of this contract by the parties of the first part, duly certified to by the inspecting officer appointed for that purpose by the Secretary of the Navy, and the acceptance of the work as satisfactory on the part of the United States, there shall be paid to the said parties of the first part, for the full and entire completion of the said dredging at the U. S. naval station, Port Royal, S. C., the sum of fifteen cents per cubic yard for items 1 and 3, and ninety-nine cents per cubic yard for items 2 and 4, respectively, under the specifications appended hereto, the sum of ----------, upon approved bills properly certified and drawn in the usual manner, and payable at such navy pay office as the parties of the first part may elect, within ten days after warrants for the same shall have been passed by the Secretary of the Treasury, and in the following manner, viz:

PAYMENTS.—Payments will be made monthly. The officer in charge shall, on or before the fifth day of each month, prepare an estimate of the work done during the month preceeding, and certify

to the amount properly payable. When such estimates
14 shall have been approved by the commandant the respective amounts thereof, less 10 per cent, shall be paid through the issuance and delivery to the contractor of bills, in quadruplicate. The reservation will constitute the last payment and will be paid when the contract is fully completed in accordance with the plans and specifications, and the work shall have been accepted by the Bureau of Yards and Docks, and not until ten days after a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of the contract shall have been executed by the contractor and delivered to the Bureau of Yards and Docks.

It is mutually understood and agreed, as aforesaid, that no payment or allowance to said parties of the first part will or shall be made by the United States for or on account of this contract, except those payments herein specified: that ten per cent will be withheld from the amount of each payment herein stipulated as security for the full completion and performance of their covenants and agreements by the said parties of the first part, and that ninety per cent of each of said payments shall be made within ten days after a warrant therefor shall have been passed by the Secretary of the Treasury.

15 In witness whereof the said parties hereto have hereunto set their hands and seals at ------ this twenty-fifth day of October, A. D. 1897.

NEW YORK DREDGING CO.
By GEO. W. CATT. [L. S.]
*President.*
JOHN McMULLEN. [L. S.]
R. PERCY WRIGHT. [L. S.]
E. O. MATTHEWS,
*Chief of Bureau of Yards & Docks.*

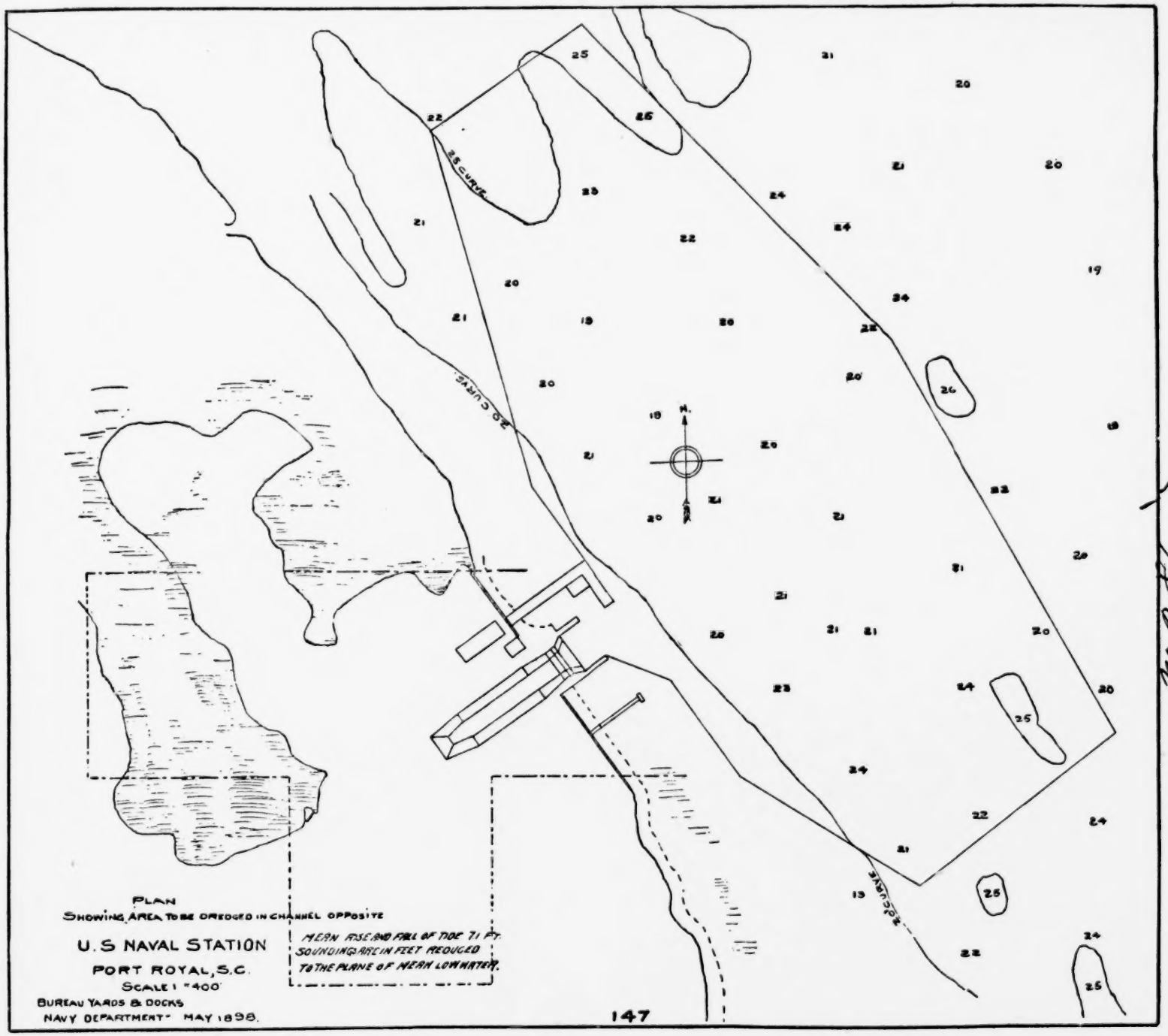
Attest:
O. L. WILLIAMS, *Secy.*

Signed and sealed in presence of:
W. H. KEMPSTON.
JAMES L. KING.
As to E. O. M.: A. E. MERRITT.

17 Specifications for dredging at United States naval station, Port Royal, S. C. Act approved June 10, 1896.

1. GENERAL DESCRIPTION.—The channel of the Beaufort River shall be increased in width and depth by dredging, so as to form a deep water basin opposite the station. If required, a part of the material dredged shall be deposited on the station; the remainder shall be disposed of elsewhere, as may be allowed by the engineer of the district.

2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated at about 1,000,000 cubic yards. This quantity is approxi-




PLAN
SHOWING AREA TO BE DREDGED IN CHANNEL OPPOSITE

U.S NAVAL STATION
PORT ROYAL, S.C.
SCALE 1 "400'
BUREAU YARDS & DOCKS
NAVY DEPARTMENT- MAY 1898.

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mate only, and may be increased or diminished as the funds allotted for the work may allow or require.

3. DRAWINGS.—They comprise a chart of the river showing the area to be dredged and a plan of the station showing points where a part of the material removed shall be deposited. These points and the quantity may be changed. The limits of the dredging may also be changed, all by the Government.

4. DREDGING.—The area shall be dredged to a depth of 30 feet below mean low water. Low water, for the purposes of this contract, is taken to be 13 feet below the coping of the dry dock at the naval station. The sides of the dredged area shall be sloped one on two. The channel to dry dock, between wing dams, about 90 by 130 feet,
18 shall be dredged to a depth of 22 (or more) feet below mean low water, if required. The mean range of tide is 7.14 feet; maximum, about 10 feet. Dredging below 1 foot in excess of the depth required to be made will be deducted and not paid for. Shoals, lumps, or ridges left behind the dredge must be removed.

5. MATERIAL.—The material to be dredged is believed to be mostly mud, sand, or soft clay; underlying these it is possible that compact hard fine sand and clay may be encountered. Each bidder, however, is expected to examine and inform himself fully on all matters relating to the character of the work required by visiting the station and examining the site of the proposed work and plans.

6. DEPOSIT.—The Government proposes to increase the area of the station by purchasing adjoining lands; therefore a part of the material shall be deposited on and within the boundaries of the station as they now exist, or may be in the future, at points to be designated by the commandant. The quantity required to be deposited on the station is about 49,000 cubic yards, but the Government reserves the right to increase or decrease this amount to any extent. Material deposited on station shall be leveled and graded. The contractor will be required to retain the material deposited upon the station within the areas prescribed by embankments or other means approved of by the engineer in charge of the work for the Government, all at his own expense. In no case shall any material be deposited where it will injuriously affect the channel in front of or leading to the station.
19 7. BUOYS, MARKS, ETC.—The lines of the area to be dredged will be given by the officer in charge. The contractor will furnish all buoys, tide gauges, and marks at his own expense, and maintain the same in good order.

8. LIMITS OF DREDGING.—And dredging done outside of limits specified will not be paid for.

9. MEASUREMENTS.—The material removed will be measured in place in the cut, in the channel, the total amount removed and paid for to be determined by the final survey and measurement made upon the completion of the entire work, and no allowance will be made for any filling that may occur during the progress of the work, increasing the amount to be removed.

All materials deposited upon the naval station will be taken from such point or points in the channel as directed by the engineer in charge, to admit of separate measurement.

If any material is removed which the contractor shall claim to be properly classed as rock, the engineer in charge will determine the classification and amount.

No materials are to be deposited upon lands in the immediate vicinity of the station without the written authority of the bureau.

10. LABOR AND MATERIAL.—The contractor shall furnish all labor and all appliances of every description adequate and necessary to the proper execution of his contract.

20 GENERAL CONDITIONS.

11. FACILITIES.—Such facilities as the station can extend, as to space or shelter for tools, machinery, and materials, or berths for floating property, will be afforded by the commandant where not in conflict with more important public interests. Upon completion of the work and before acceptance of the same all floating property in front of station and all tools, machinery, and materials on station shall be removed.

12. TRANSPORTATION.—The contractor shall furnish all transportation for men, tools, machinery, material, and supplies of every description.

13. PATENTS.—The use of all patented articles and methods employed in doing the work is to be included in the contract without any additional charge or expense to the Government.

14. INTENTION.—It is the declared intention and meaning of the contract that the work shall be performed in accordance with the plans and specifications to the entire satisfaction of the Bureau of Yards and Docks. Any omissions from both plans and specifications of details of work, the performance of which is necessary, of which the officer in charge of the work shall be the judge, shall be done by the contractor as though fully described and shown, and without additional expense to the Government. When a difference between plans and specifications exists, the specifications shall govern as to the true intent and meaning.

15. CONTROL OF WORK.—The Government shall at all times,
21 by its officer in charge, have full direction and oversight of all work done under these specifications, and in all cases of dispute as to their meaning and intent the decision of the officer in charge, approved by the commandant, shall be final, subject only to the action of the Bureau of Yards and Docks.

16. TIME OF COMMENCEMENT OF WORK.—The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption, the entire work to be completed in sixteen calendar months from date of contract.

17. PROGRESS OF WORK.—If at the close of any working month the progress of the work shall not have been such as to indicate that it

will be completed within the time specified in the contract, the Government may refer the matter to a board of three officers, and, if recommended by them and the interests of the Government so require, annul the contract and complete the work in such manner as it deems best, at the expense of the contractor and his sureties.

18. UNAVOIDABLE DELAYS.—When an unavoidable accident, storm, or other act of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence, in detail, and state in what way and to what extent it will delay the fulfillment of his contract, in order that the necessary investigation may be made and the matter put on record. And it is clearly to be understood that unless it be done whenever such thing occurs, no subsequent application for an extension of time for the completion of the contract on account of such occurrence will be recommended.

22 19. AVOIDABLE DELAYS.—Should the progress of the work be delayed by anything but unforeseen and unavoidable accidents, storms, or other acts of Providence, or by the action of the Government, no application by the contractor for an extension of time for the completion of his contract will be recommended by the officer in charge for favorable consideration, except on condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and by granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt.

20. AUTHORITY FOR EXTENSION OF TIME.—No extension of time for the completion of the work will be made except upon the authority of the Secretary of the Navy.

21. DAMAGES FOR DELAY.—In case the completion of the work shall be delayed beyond the period fixed upon for the completion of the contract, deductions of $50 per day during such delay may, in the discretion of the Secretary of the Navy, be made from the contract price of said work as liquidated damages.

22. EXTRAS.—All expense of every description that may be
23 incurred in the prosecution of the work required must be covered by the contract price, as no extra allowance will be made.

23. CHANGES.—Should it be to the interest of the Government to make any changes in the plans or specifications exceeding $500 in value the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of naval officers, and the contractor shall be bound by their decision, and no further payments shall be made until their decision shall be accepted by the contractor, in writing. Changes in plans or specifications

not exceeding $500 in value may be made by mutual agreement, in writing.

24. RESPONSIBILITY.—The United States will not be responsible for any damage that may occur to the contractor's plant or other property whatever during the progress of the work, and he must assume all risks from storms, fire, damage to persons or property, and casualties of every description.

25. REPRESENTATIVE.—The contractor, in his own absence, shall keep a responsible representative on the work to receive the directions of the officer in charge of the work.

26. DISORDERLY OR INCOMPETENT PERSONS.—At the request of the officer in charge, approved by the commandant, any disordely, careless, or incompetent persons shall at once be discharged and not employed again.

CONTRACT, BOND, PAYMENTS, ETC.

27. BOND.—The bond required will be $30,000.

28. PROPOSAL.—Each proposal must be accompanied by a
24 certified check, payable to the Chief of the Bureau of Yards and Docks, for the sum of $5,000, as a guarantee that the bidder will, within fifteen days after notice of the acceptance of his proposal, execute the required contract, and give bond in a penal sum of $30,000, conditioned for the faithful performance of the contract.

29. The check of the successful bidder will be returned to him when the contract has been approved by the Chief of the Bureau of Yards and Docks.

30. The checks of the unsuccessful bidders will be returned to them by registered letter on the awarding of the contract.

31. PAYMENTS.—Payments will be made monthly. The officer in charge shall, on or before the fifth day of each month, prepare an estimate of the work done during the month preceding and certify to the amount properly payable. When such estimates shall have been approved by the commandant, the respective amounts thereof, less 10 per cent, shall be paid through the issuance and delivery to the contractor of bills in quadruplicate. The reservations will constitute the last payment and will be paid when the contract is fully completed in accordance with the plans and specifications and the work shall have been accepted by the Bureau of Yards and Docks, and not until ten days after a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description under or by virtue of the contract, shall have been executed by the contractor and delivered to the Bureau of Yards and Docks.

25 32. BIDS.—Bidders will make separate and distinct offers for each of the following items of work:

Item 1. A price per cubic yards for earth dredged and deposited on the station, leveled and graded.

Item 2. A price per cubic yard for rock dredged and deposited on the station, leveled and graded, if required.

Item 3. A price per cubic yard for earth dredged and not deposited on station.

Item 4. A price per cubic yard for rock dredged and not deposited on station.

33. The Bureau of Yards and Docks reserves the right to omit from the contract any, or part of any, of the above items, to reject any or all bids as the interests of the Government require, and to waive defects.

NAVY DEPARTMENT,
*Bureau of Yards and Docks, September, 1897.*

EXHIBIT F (TO COMPLAINT).

JUSTIFICATION OF THE SURETIES.

STATE OF CALIFORNIA,
*City and County of San Francisco, ss:*

I, John McMullen, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of thirty thousand dollars over and above all my debts and liabilities.

JOHN McMULLEN.

26 * Subscribed and sworn to before me,
[SEAL.] JAMES L. KING,
*Notary Public in and for City and County of San Francisco, State of California.*

STATE OF CALIFORNIA,
*City and County of San Francisco, ss:*

I, R. Percy Wright, one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of thirty thousand dollars over and above all my debts and liabilities.

R. PERCY WRIGHT.

* Subscribed and sworn to before me,
[SEAL.] JAMES L. KING,
*Notary Public in and for City and County of San Francisco, State of California.*

CERTIFICATE.†

I, J. P. Jackson, collector of the port of San Francisco, do hereby certify that John McMullen and R. Percy Wright, the sureties above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily worth over and above all his

* The justification of the sureties to be sworn to before a notary public or justice of the peace.

† The certificate to be signed by any United States officer.

debts and liabilities the sum stated in the accompanying affidavit subscribed by him.

J. P. JACKSON, [SEAL.]
*Collector.*

27 BOND.

Know all men by these presents that we the New York Dredging Company, as principals, and John McMullen and R. Percy Wright, as sureties, all of San Francisco, State of California, are held and firmly bound unto the United States of America in the penal sum of thirty thousand dollars, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-fifth day of October, A. D. 1897.

CONDITIONS.

The condition of the above bond is such that if the said above-bounden New York Dredging Company, their heirs, executors, or assigns shall well and truly and in a satisfactory manner, fulfill and perform the stipulations of the contract hereto annexed, entered into with the Chief of the Bureau of Yards and Docks, acting under the directions of the Secretary of the Navy, for and in behalf of the United States, and shall conform in all respects to said contract, and to the plans and specifications attached thereto and forming a part thereof, and to the satisfaction of the said Chief of the Bureau of Yards and Docks, and shall promptly make payments to all persons supplying him or them labor and materials in the prosecution
28 of the work provided for in the aforesaid contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

NEW YORK DREDGING CO. [SEAL.]
By GEO. W. CATT, *President.*
JOHN McMULLEN. [SEAL.]
R. PERCY WRIGHT. [SEAL.]

Attest:

O. L. WILLIAMS, *Secy.*

Signed and sealed in presence of:

W. N. KEMPSTON,
JAMES L. KING,
N.

EXHIBIT D (TO COMPLAINT).

Form No. 4, Y. & D.
Ed. 6-1-01—1000.

(------ of Contract No. 916.)

This contract, made and concluded at Washington, D. C., this 21st day of May, A. D. 1901, by and between P. Sanford Ross, a citizen of

Jersey City, New Jersey, acting for himself, his heirs, executors, and administrators, party of the first part, and the United States, by Mordecai T. Endicott, Chief of the Bureau of Yards and Docks, Navy Department, acting under the direction of the Secretary of the Navy, party of the second part.

Witnesseth, that for and in consideration of the payments hereinafter specified, the party of the first part hereby covenants and agrees to and with the party of the second part as follows, viz:

29 First. That the said party of the first part will provide, furnish, and deliver, at his own risk and expense, at the United States Naval Station, Port Royal, South Carolina, all the necessary materials, labor tools, and appliances for the completion, in all respects, of dredging and removing seventy thousand cubic yards, more or less, of material from the waters of said naval station, and will complete the same within fifteen calendar months from the date of this contract, in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto and forming part of this contract, for the sum of one dollar and twenty-five cents per cubic yard, the work to be done being that contemplated in items 3 and 4 of paragraph No. 32 of said specification.

Second. The party of the first part further covenants and agrees to forever protect and defend the party of the second part in the full and free use and enjoyment of any and all rights to any invention, machine, or device which may be applied as a part of the work herein specified and contracted for, either in its construction or use after completion, against the demands of all persons whomsoever.

Third. The party of the first part further agrees that if during the progress of the work it shall be deemed, by the party of the second part, necessary or desirable to make any changes or modifications in the said plans and specifications, affecting the cost of the work to be done hereunder, said changes or modifications, and

30 the amount of the increased or diminished compensation to be paid the party of the first part in consequence thereof, shall be stipulated and agreed to in writing by the parties to the contract before the work contemplated by such changes or modifications is begun; and such increased or diminished compensation shall, when exceeding $300, be assessed by a board of naval officers appointed for the purpose, and shall be based upon actual cost.

And this contract further witnesseth,

Fourth. That the party of the second part, for and in consideration of the foregoing, and for and in consideration of the faithful performance of this contract by the party of the first part, duly certified to by the inspecting officer appointed for that purpose, and the acceptance of the work as satisfactory on the part of the United States, do hereby covenant and agree, to and with the party of the first part, that there shall be paid to the said party of the first part, for the full and entire completion of the said dredging and removal of material, the sum of one dollar and twenty-five cents ($1.25), per

cubic yard, upon approved bills certified and drawn in the usual manner, and payable through such navy pay office as the party of the first part may elect, within ten days after warrants for the same shall have been passed by the Secretary of the Treasury, in the following manner, viz.: as provided in paragraph thirty-one (31) of the specification aforesaid.

Fifth. It is mutually understood and agreed that no payment or allowance to said party of the first part will or shall be made
31 by the United States for or on account of this contract, except those payments herein specified, and that, when not otherwise specifically provided, ten per cent will be withheld from the amount of each of such payments as security for the full completion and performance of the covenants and agreements hereof by the said party of the first part, and that the final payment made hereunder shall include the amounts so withheld.

Sixth. It is further mutually and expressly covenanted and agreed, and this contract is upon the express condition, that no Member of or Delegate to Congress, nor any officer of the United States, naval, military, or civil, is, or shall be, admitted to any share or part of this contract or to any benefit to arise therefrom; that any transfer of this contract or of any interest therein to any person or party by the said party of the first part shall annul this contract so far as the United States are concerned; that if said party of the first part shall fail or neglect in any respect to perform this contract or any part thereof as provided it may, at the option of the United States, be declared null and void, without prejudice to the right of the United States to recover for defaults herein, or violations hereof, and for such default the United States may demand and recover of said party of the first part, as liquidated damages, a sum of money equal to the penalty of the bond attached to and forming a part of this contract.

32 In witness whereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

P. SANFORD ROSS. [L. S.]
THE UNITED STATES,
By MORDECAI T. ENDICOTT, [L. S.]
*Chief of Bureau of Yards and Docks,*
*acting under the direction of the Secretary of the Navy.*

Signed and sealed in the presence of:

CHAS. DAY.
WM. S. SMITH
(As to M. T. E.)

Sealed proposals, endorsed "Proposals for dredging," will be received at the Bureau of Yards and Docks, Navy Department, Washington, until 1 o'clock May 11, 1901, and then and there publicly opened, for dredging at the Naval Station, Port Royal, S. C. Appropriation to be expended, $87,000. For plans, specifications, and

forms of proposals address "Commandant, Naval Station, Port Royal, S. C." MORDECAI T. ENDICOTT, Chief of Bureau, Apr. 10, 1901.

33 Specification No. 1114, for the completion of dredging at the United States Naval Station, Port Royal, S. C., under appropriation "Naval Station, Port Royal, S. C., dredging channel opposite station." Act approved June 10, 1896.

GENERAL CONDITIONS.

1. INTENTION.—It is the declared and acknowledged intention and meaning to secure the completion of the work of dredging a channel opposite the Naval Station, Port Royal, S. C., according to plans and specifications which were attached to and formed a part of a contract between the New York Dredging Company, by Geo. W. Catt, president, of New York, N. Y., as principal, and John McMullen and R. Percy Wright, both of the city and county of San Francisco, State of California, as sureties, parties of the first part, and the United States, by E. O. Mathews, Chief of the Bureau of Yards and Docks, acting under the direction of the Secretary of the Navy, party of the second part, said contract having been declared forfeited. Copies of the plans and specification and further information, if desired, can be obtained upon application to the Commandant, Naval Station, Port Royal, S. C.

2. WORK COMPLETED.—Under the terms of the aforesaid con-
34 tract, there were removed from the channel 25,887 cubic yards of material classed as earth and 54,531 cubic yards of material classed as rock, all of which was deposited on the station.

3. APPROPRIATION AVAILABLE.—The balance of the appropriation available for continuing the work is $87,982.20. The work will be carried on under the new contract until the balance stated is exhausted by payments to the contractor and government inspectors on the work.

4. PROPOSALS, CONTRACT, ETC.—Following is a reprint of the specifications above referred to, the terms of which will govern, except as herein otherwise stated, in making and receiving proposals, executing contract, carrying on work, including, among other things, time of commencement of work, extension of time, damages for delay, measurements, etc.

5. TIME FOR COMPLETION.—The time for the completion of the work shall be fifteen months from the date of the contract.

NAVY DEPARTMENT,
*Bureau of Yards and Docks, April, 1901.*

Specifications for dredging at United States Naval Station, Port Royal, S. C. Act approved June 10, 1896.

1. GENERAL DESCRIPTION.—The channel of the Beaufort River shall be increased in width and depth by dredging, so as to form a deep

water basin opposite the station. If required, a part of the material dredged shall be deposited on the station; the re-
35 mainder shall be disposed of elsewhere, as may be allowed by the engineer of the district.

2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated at about 1,000,000 cubic yards. This quantity is approximate only, and may be increased or diminished as the funds allotted for the work may allow or require.

3. DRAWINGS.—They comprise a chart of the river showing the area to be dredged, and a plan of the station showing the points where a part of the material removed shall be deposited. These points and the quantity may be changed. The limits of the dredging may also be changed, all by the Government.

4. DREDGING.—The area shall be dredged to a depth of 30 feet below mean low water. Low water, for the purposes of this contract, is taken to be 13 feet below the coping of the dry dock at the naval station. The sides of the dredged area shall be sloped one on two. The channel to dry dock, between wing dams, about 90 by 130 feet, shall be dredged to a depth of 22 (or more) feet below mean low water, if required. The mean range of tide is 7.14 feet; maximum, about 10 feet. Dredging below 1 foot in excess of the depth required to be made will be deducted and not paid for. Shoals, lumps, or ridges left behind the dredge must be removed.

5. MATERIALS.—The material to be dredged is believed to be mostly mud, sand, or soft clay; underlying these it is possible that compact hard find sand and clay may be encountered. Each bidder, however, is expected to examine and inform himself fully on all matters
36 relating to the character of the work required by visiting the station and examining the site of the proposed work and plans.

6. DEPOSIT.—The Government proposes to increase the area of the station by purchasing adjoining lands; therefore a part of the material shall be deposited on and within the boundaries of the station as they now exist, or may be in the future, at points to be designated by the commandant. The quantity required to be deposited on the station is about 49,000 cubic yards, but the Government reserves the right to increase or decrease this amount to any extent. Material deposited on station shall be leveled and graded. The contractor will be required to retain the material deposited upon the station within the areas prescribed, by embankments or other means approved of by the engineer in charge of the work for the Government, all at his own expense. In no case shall any material be deposited where it will injuriously affect the channel in front of or leading to the station.

7. BUOYS, MARKS, ETC.—The lines of the area to be dredged will be given by the officer in charge. The contractor will furnish all buoys, tide gauges, and marks at his own expense, and maintain the same in good order.

8. LIMITS OF DREDGING.—And dredging done outside of limits specified will not be paid for.

9. MEASUREMENTS.—The material removed will be measured in place in the cut, in the channel. The total amount removed and paid for to be determined by the final survey and measurement
37 made upon the completion of the entire work, and no allowance will be made for any filling in that may occur during the progress of the work, increasing the amount to be removed.

All materials deposited upon the naval station will be taken from such point or points in the channel as directed by the engineer in charge, to admit of separate measurement.

If any material is removed which the contractor shall claim to be properly classed as rock, the engineer in charge will determine the classification and amount.

No materials are to be deposited upon lands in the immediate vicinity of the station without the written authority of the bureau.

10. LABOR AND MATERIAL.—The contractor shall furnish all labor, and all appliances of every description adequate and necessary to the proper execution of his contract.

GENERAL CONDITIONS.

11. FACILITIES.—Such facilities as the station can extend, as to space or shelter for tools, machinery, and materials, or berths for floating property, will be afforded by the commandant where not in conflict with more important public interests. Upon completion of the work, and before acceptance of the same, all floating property in front of station and all tools, machinery, and materials on station shall be removed.

12. TRANSPORTATION.—The contractor shall furnish all transportation for men, tools, machinery, material, and supplies of every description.

38 13. PATENTS.—The use of all patented articles and methods employed in doing the work is to be included in the contract without any additional charge or expense to the Government.

14. INTENTION.—It is the declared intention and meaning of the contract that the work shall be performed in accordance with the plans and specifications to the entire satisfaction of the Bureau of Yards and Docks. Any omissions from both plans and specifications of details of work, the performance of which is necessary, of which the officer in charge of the work shall be the judge, shall be done by the contractor as though fully described and shown, and without additional expense to the Government. When a difference between plans and specifications exists the specifications shall govern as to the true intent and meaning.

15. CONTROL OF WORK.—The Government shall at all times, by its officer in charge, have full direction and oversight of all work done under these specifications, and in all cases of dispute as to their meaning and intent the decision of the officer in charge, approved by the commandant, shall be final, subject only to the action of the Bureau of Yards and Docks.

16. TIME OF COMMENCEMENT OF WORK.—The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption; the entire work to be completed in sixteen calendar months from date of contract.

17. PROGRESS OF WORK.—If at the close of any working month
39 the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the Government may refer the matter to a board of three officers, and if recommended by them, and the interests of the Government so require, annul the contract and complete the work in such manner as it deems best, at the expense of the contractor and his sureties.

18. UNAVOIDABLE DELAYS.—When an unavoidable accident, storm, or other act of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence in detail, and state in what way and to what extent it will delay the fulfillment of his contract, in order that the necessary investigation may be made, and the matter put on record. And it is clearly to be understood that, unless it be done whenever such thing occurs, no subsequent application for an extension of time for the completion of the contract on account of such occurrence will be recommended.

19. AVOIDABLE DELAYS.—Should the progress of the work be delayed by anything but unforeseen and unavoidable accidents, storms, or other acts of Providence, or by the action of the Government, no application by the contractor for an extension of time for the completion of his contract will be recommended by the officer in charge for favorable consideration, except on condition that the con-
40 tractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and by granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt.

20. AUTHORITY FOR EXTENSION OF TIME.—No extension of time for the completion of the work will be made except upon the authority of the Secretary of the Navy.

21. DAMAGES FOR DELAY.—In case the completion of the work shall be delayed beyond the period fixed upon for the completion of the contract, deductions of $50 per day during such delay may, in the discretion of the Secretary of the Navy, be made from the contract price of said work, as liquidated damages.

22. EXTRAS.—All expense of every description that may be incurred in the prosecution of the work required must be covered by the contract price, as no extra allowance will be made.

23. CHANGES.—Should it be to the interest of the Government to make any changes in the plans or specifications, exceeding $500 in value, the increased or decreased compensation to which the contractor may be entitled is to be determined by a board of naval
41 officers, and the contractor shall be bound by their decision, and no further payments shall be made until their decision shall be accepted by the contractor, in writing. Changes in plans or specifications, not exceeding $500 in value, may be made by mutual agreement, in writing.

24. RESPONSIBILITY.—The United States will not be responsible for any damage that may occur to the contractor's plant or other property whatever during the progress of the work, and he must assume all risks from storms, fire, damage to persons or property, and casualities of every description.

25. REPRESENTATIVE.—The contractor, in his own absence, shall keep a responsible representative on the work to receive the directions of the officer in charge of the work.

26. DISORDERLY OR INCOMPETENT PERSONS.—At the request of the officer in charge, approved by the commandant, any disorderly, careless, or incompetent persons shall at once be discharged and not employed again.

CONTRACT, BOND, PAYMENTS, ETC.

27. BOND.—The bond required will be $30,000.

28. PROPOSAL.—Each proposal must be accompanied by a certified check, payable to the Chief of the Bureau of Yards and Docks, for the sum of $5,000, as a guarantee that the bidder will, within fifteen days after notice of the acceptance of his proposal, execute the required contract and give bond in a penal sum of $30,000, conditioned for the faithful performance of the contract.

42 29. The check of the successful bidder will be returned to him when the contract has been approved by the Chief of the Bureau of Yards and Docks.

30. The checks of the unsuccessful bidders will be returned to them by registered letter on the awarding of the contract.

31. PAYMENTS.—Payments will be made monthly. The officer in charge shall, on or before the fifth day of each month, prepare an estimate of the work done during the month preceding, and certify to the amount properly payable. When such estimates shall have been approved by the commandant the respective amounts thereof, less 10 per cent, shall be paid through the issuance and delivery to the contractor of bills, in quadruplicate. The reservations will constitute the last payment and will be paid when the contract is fully completed in accordance with the plans and specifications and the work shall have been accepted by the Bureau of Yards and Docks, and not until ten days after a final release to the United States, in such form as shall be approved by the Secretary of the Navy, of all claims of any kind or description, under or by virtue of the contract,

shall have been executed by the contractor and delivered to the Bureau of Yards and Docks.

32. Bids.—Bidders will make separate and distinct offers for each of the following items of work:

Item 1. A price per cubic yard for earth dredged and deposited on the station, leveled and graded.

Item 2. A price per cubic foot for rock dredged and deposited on the station, leveled and graded if required.

43 Item 3. A price per cubic yard for earth dredged and not deposited on station.

Item 4. A price per cubic yard for rock dredged and not deposited on station.

33. The Bureau of Yards and Docks reserves the right to omit from the contract any, or part of any, of the above items, to reject any or all bids, as the interests of the Government require, and to waive defects.

Navy Department,
*Bureau of Yards and Docks, September, 1897.*

47 BOND.

(Note.—This form to be used when bond is not given by a corporation authorized to act as sole surety.)

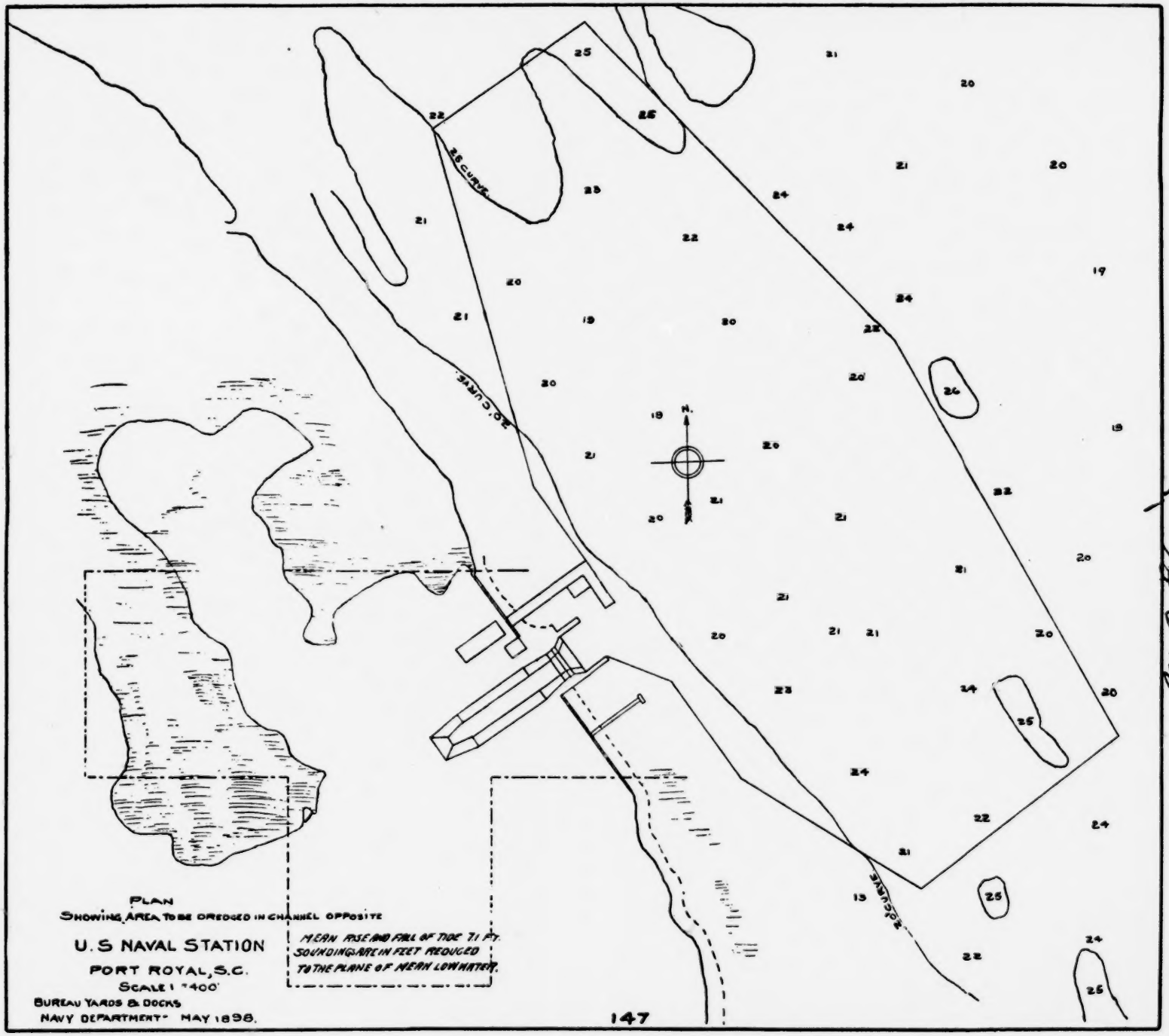
Know all men by these presents that we, P. Sanford Ross, of Jersey City, Hudson Co., New Jersey, principal, and Elisha B. Gaddis, of Newark, Essex Co., New Jersey; John W. Harrison, of Jersey City, Hudson Co., N. J., as sureties, are held and firmly bound unto the United States of America in the penal sum of thirty thousand ($30,000.00) dollars, to be paid to the said United States, for which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, successors, assigns, and representatives, jointly and severally, by these payments.

Signed, sealed with our seals, and dated this 21st day of May, A. D. 1901.

CONDITIONS.

The condition of the above bond is such that if the said above-bounden principal, P. Sanford Ross, his or their heirs, successors, executors, or administrators, shall well and truly, and in a satisfactory manner, fulfill and perform the stipulations of the contract hereto annexed, entered into with the Chief of the Bureau of Yards and Docks, acting under the directions of the Secretary of the Navy, for and in behalf of the United States, and shall conform in all respects to said contract, as it now exists or may be modified by

48 the parties thereto according to its terms, and to the plans and specifications attached thereto and forming a part thereof, and to the satisfaction of the said Chief of the Bureau of Yards and Docks, and shall promptly make payments to all persons supplying

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Pet. Dft
U.S. States
vs
McMullen

No. 415

No. 281
U. S. Navy Yard
Mr. Mullen
#46.

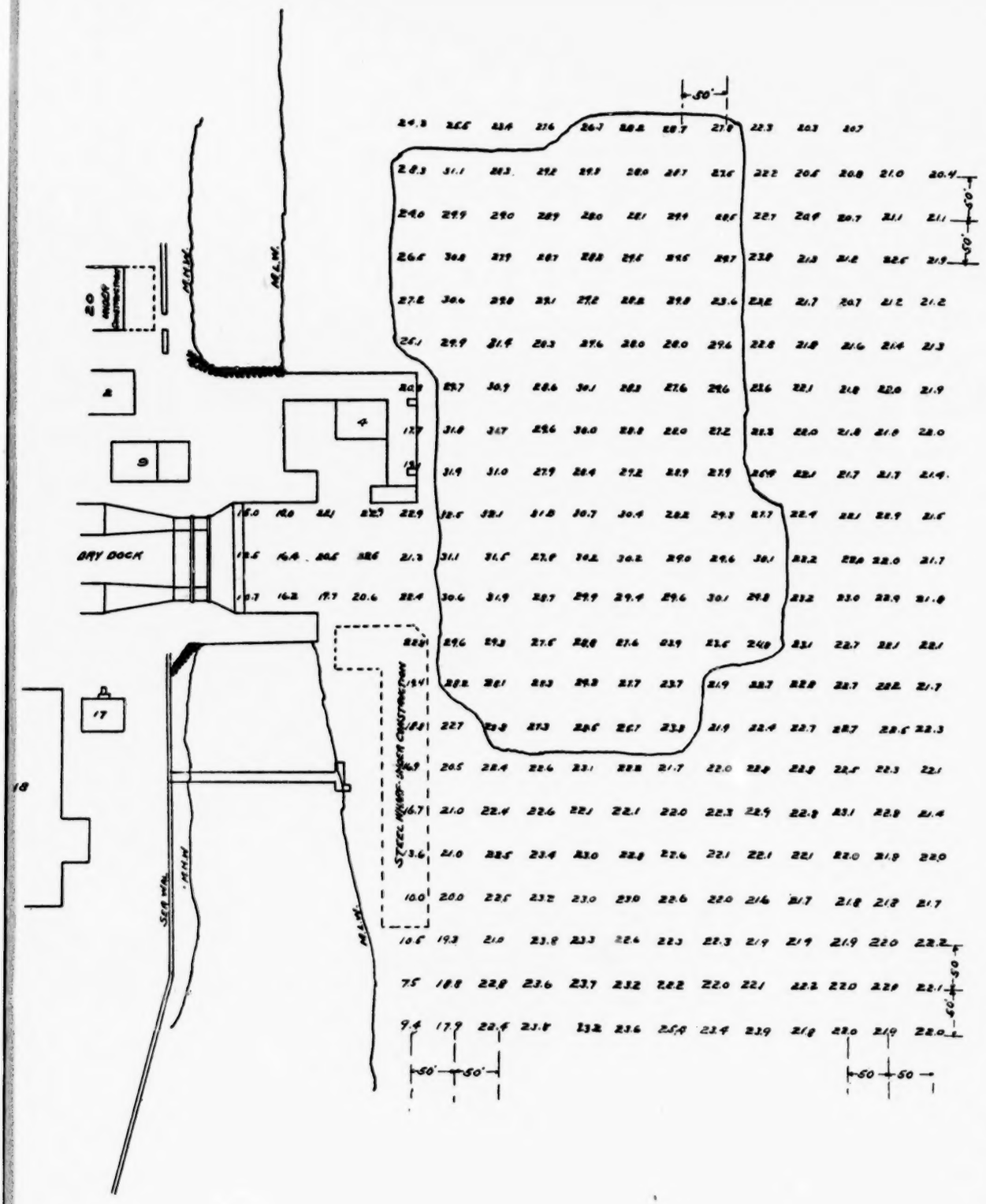


CHART OF CHANNEL
OPPOSITE
U.S. NAVAL STATION, PORT ROYAL S.C.
REQUESTED BY BUREAU'S LETTER NO 6056 NOV. 8 1900
SOUNDINGS EXPRESSED IN FEET AND TENTHS AND REDUCED TO M.L.W.
13 FEET BELOW COPING OF DRY DOCK.
CIVIL ENGINEER'S OFFICE
NOVEMBER 1900
SCALE 1 in = 100 FT
Rear Admiral
CHIEF OF BUREAU
REAR ADMIRAL U.S.N. COMM. N.D.T.
CIVIL ENGINEER, U.S.N.
RED LINES ENCLOSE AREA OVER WHICH N.Y. DREDGING CO OPERATED
K10.

him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue.

P. SANFORD ROSS. [L. S.]
ELISHA B. GADDIS. [L. S.]
JOHN W. HARRISON. [L. S.]

Signed, sealed, and delivered in presence of:

CHAS. DAY.
(As to P. Sanford Ross.)
W. L. RESS.
(As to Elisha B. Gaddis.)
S. W. DECKER.
(As to John W. Harrison.)

JUSTIFICATION OF THE SURETIES.

STATE OF NEW JERSEY,
*County of Hudson, ss:*

I, Elisha B. Gaddis, of Newark, Essex Co., N. J., one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of thirty thousand dollars over and above all my debts and liabilities.

ELISHA B. GADDIS.

49 Subscribed and sworn to before me, this 22d day of May, 1901, at Jersey City.

ISAAC ROMAINE, [SEAL.]
*Notary Public of New Jersey.*

STATE OF NEW JERSEY,
*County of Hudson, ss:*

I, John W. Harrison, of Jersey City, Hudson Co., N. J., one of the sureties named in the within bond, do swear that I am pecuniarily worth the sum of thirty thousand dollars over and above all my debts and liabilities.

JOHN W. HARRISON.

Subscribed and sworn to before me, this 22d day of May, 1901, at Jersey City.

ISAAC ROMAINE, [SEAL.]
*Notary Public of New Jersey.*

CERTIFICATE.

I, Isaac Romaine, do hereby certify that Elisha B. Gaddis and John W. Harrison, the sureties above named, are personally known to me, and that, to the best of my knowledge and belief, each is pecuniarily

worth, over and above all his debts and liabilities, the sum stated in the accompanying affidavit subscribed by him.

ISAAC ROMAINE. [SEAL.]
*U. S. Commissioner (official title), District of New Jersey.*

(Endorsed:) Filed December 5, 1903. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

50 United States of America.

Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN AND R. PERCY WRIGHT, DEFENDANTS.

Action brought in the said Circuit Court, and the complaint filed in the office of the clerk of said Circuit Court, in the city and county of San Francisco.

*Summons.*

*The President of the United States of America, greeting, to New York Dredging Company, John McMullen and R. Percy Wright, defendants:*

You are hereby directed to appear and answer the complaint in an action entitled as above, brought against you in the Circuit Court of the United States, Ninth Circuit, in and for the Northern District of California, within ten days after the service on you of this summons—if served within this county; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any
51 money or damages demanded in the complaint, as arising upon contract, or it will apply to the court for any other relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 5th day of December in the year of our Lord one thousand nine hundred and three, and of our Independence the one hundred and twenty-eighth.

[SEAL.] SOUTHARD HOFFMAN,
*Clerk.*

UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify and return, that I received the within writ on the 11th day of December, 1903, and personally served the same on the

14th day of December, 1903, on R. Percy Wright by delivering to and leaving with R. Percy Wright one of said defendants named therein, at the city and county of San Francisco in said district, a certified copy thereof, together with a copy of the complaint, certified to by plaintiffs attorney attached thereto. I further return that after due and diligent search and enquiring I was unable to find New York Dredging Company in my district.

San Francisco, Dec. 15th, 1903.

JOHN H. SHINE,
*U. S. Marshal.*
By E. A. MORSE,
*Office Deputy.*

52 UNITED STATES MARSHAL'S OFFICE,
NORTHERN DISTRICT OF CALIFORNIA.

I hereby certify, that I received the within writ on the 11th day of Dec., 1903, and personally served the same on the 11th day of Dec., 1903, upon John McMullen by delivering to, and leaving with, John McMullen, one of said defendants named therein personally, at the city and county of San Francisco in said district, a certified copy thereof, together with a copy of the complaint, certified to by plaintiffs' attorney attached thereto.

San Francisco, Dec. 11, 1903.

JOHN H. SHINE,
*U. S. Marshal.*
By E. A. MORSE,
*Deputy.*

(Endorsed:) Filed December 26th, 1903. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY ET AL., DEFENDANTS.

*Answer of defendants, McMullen and Wright.*

The defendants John McMullen and R. Percy Wright for answer to the complaint in the above-entitled action:

53 1. Allege that said defendants have not, nor has either of them, sufficient information or belief to enable them, or either of them, to answer any of the allegations in the fifth subdivision or paragraph of said complaint and on that ground they and each of them deny that the defendant New York Dredging Company failed or refused or neglected to perform the covenants and conditions, or

the covenants or conditions, in the contract annexed to said complaint and marked "Exhibit B."

2. Allege that said defendants have not, nor has either of them, sufficient information or belief to enable them or either of them, to answer any of the allegations in the sixth subdivision or paragraph in said complaint, and on that ground said defendants and each of them deny that the Secretary of the Navy, either availing himself of the terms of said contract, dated October 26, 1897, or at all, did declare the same null and void.

3. Allege that said defendants John McMullen and R. Percy Wright have not, nor either of them, sufficient information or belief to enable them or either of them to answer any of the allegations in the seventh subdivision or paragraph in said complaint, and on that ground thay and each of them deny that said Secretary of the Navy, did, either after the abrogation of said contract, or at all, advertise, pursuant to law, or at all, for proposals to complete the work of dredging which said New York Dredging Company failed to complete in accordance with the contract, plans and specifications referred to in the complaint herein and marked "Exhibit C."

54 4. On information and belief, said John McMullen and R. Percy Wright, deny that by the terms of the contract or agreement alleged in the eighth subdivision or paragraph in said complaint to have been entered into between P. Sanford Ross and the Chief of the Bureau of Yards and Docks of the United States Navy Department, said O. Sanford Ross was to perform certain work, labor or services in said work of dredging, which said work was left uncompleted by said New York Dredging Company.

5. Allege that said defendants have not, nor has either of them, sufficient information or belief to enable them or either of them to answer the allegations in said eighth subdivision or paragraph, that said P. Sanford Ross performed all the covenants and conditions in said contract marked "Exhibit D," agreed by him to be performed; completed the said work of dredging and was paid therefor, and on that ground said defendants and each of them deny that said P. Sanford Ross performed all the covenants and conditions in said contract agreed by him to be performed or that he performed any of said covenants or conditions; and on the same ground deny that said P. Sanford Ross completed the work of dredging mentioned in said paragraph eighth.

6. Said defendants John McMullen and R. Percy Wright allege that they have not, nor has either of them sufficient information or belief to enable them or either of them to answer the allegation

55 in the ninth subdivision or paragraph in said complaint, and on that ground they and each of them deny that the plaintiffs have performed all or any of the conditions agreed by them to be performed.

7. Allege that said defendants have not, nor has either of them, sufficient information or belief to enable them or either of them to answer any of the allegations in the eleventh subdivision or para-

graph in said complaint, and on that ground they and each of them deny that the defendant New York Dredging Company has failed, neglected, or refused to perform the terms or conditions of the contract agreed by them to be performed, and deny that the plaintiffs herein have been injured to their harm or damage in the sum of $57,338.22, or in any other sum, and deny that said sum or any other sum of money represents the difference between what the defendant New York Dredging Company agreed to perform the work of dredging for, and what it actually cost the plaintiffs to complete said work under the contract with P. Sanford Ross, or in any other way, and deny that either the sum of $31,750.00 accrued under said contract between New York Dredging Company and the plaintiffs, annexed to said complaint and marked "Exhibit B," as liquidated damages under the same.

I.

And for a further and separate answer and defense in the above-entitled action, said defendants John McMullen and R. Percy Wright allege:

1. On February 23, 1899, the plaintiffs extended the time within which the defendant New York Dredging Company was, by
56 the terms of said contract entered into October 25, 1897, annexed to the complaint herein, and marked "Exhibit B," to have been fulfilled by said New York Dredging Company, and the work mentioned therein was to have been completed, from February 23, 1899, to December 30, 1899.

2. Said time was extended, and the condition of said contract was in that regard changed by said plaintiffs, without the consent of said defendants John McMullen and R. Percy Wright, the sureties in the writing obligatory or bond mentioned in said complaint, copy of which is annexed thereto and marked "Exhibit E."

Wherefore said defendants pray judgment that the plaintiffs take nothing by their action against them.

R. PERCY WRIGHT,
*Atty. for Deft. J. McMullen.*
R. PERCY WRIGHT,
*Deft. in propria persona.*

STATE OF NEW YORK,
*County of New York, ss:*

John McMullen and R. Percy Wright, being duly sworn, each for himself, deposes and says: That he is the defendant named in the foregoing answer; that he has read said answer and knows the contents thereof; that the same is true of his own knowledge, except as to the matters stated therein on information or belief, and as those, that he believes them to be true.

JOHN McMULLEN.
R. PERCY WRIGHT.

57 Subscribed and sworn to before me this 11th day of February, 1904.

[SEAL.] BELLE KEILSON,
*Notary Public, No. 63, King Co.*

(Certificate filed county of New York.)

Service of a copy hereof is admitted this 17th day of February, 1904.

MARSHALL B. WOODWORTH,
*U. S. Dist. Atty.*

(Endorsed:) Filed February 17, 1904. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

In the United States Circuit Court, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY ET AL., DEFENDANTS.

*Answer of defendant, New York Dredging Company.*

The defendant, New York Dredging Company, for answer to the complaint in the above-entitled action:

1. Denies that said defendant, New York Dredging Company, failed, refused, or neglected to perform any of the covenants or conditions set forth in the contract, alleged in said complaint, annexed thereto, and marked "Exhibit C," and agreed by said defendant to be performed.

2. Denies that the Secretary of the Navy, either availing
58 himself of the terms of the said contract dated October 26, 1897, or at all, did declare the same null and void.

3. Denies that said Secretary of the Navy did, either after the abrogation of said contract, or at all, advertise pursuant to law, or at law, for proposals to complete the work of dredging which said New York Dredging Company failed to complete in accordance with the contract, plans, and specifications referred to in the complaint herein and marked "Exhibit C."

4. Denies that by the terms of the contract or agreement alleged in the eighth subdivision or paragraph in said complaint to have been entered into between P. Sanford Ross and the Chief of the Bureau of Yards and Docks of the United States Navy Department, said P. Sanford Ross was to perform certain work, labor, or services in the work of dredging mentioned in said complaint, which said work was left uncompleted by said New York Dredging Company.

5. Alleges that no certain or definite quantity of work, labor, or services in said work of dredging was ever fixed or determined by the United States Navy Department or required by said department to be performed by said defendant, New York Dredging Company, under or pursuant to the contract, plans, or specifications referred to in the complaint herein and marked "Exhibit C."

6. Alleges that said defendant, New York Dredging Company, has not any information or belief to enable it to answer the allegations in said eighth subdivision or paragraph that said P. San-
59 ford Ross performed all the covenants and conditions mentioned in the contract alleged in said complaint and marked "Exhibit D," agreed by him to be performed, completed the said work of dredging and was paid therefor, and on that ground said defendant denies that P. Sanford Ross performed all of the covenants and conditions in said contract agreed by him to be performed, or that he performed any of said covenants or conditions, and on the same ground denies that said P. Sanford Ross completed the work of dredging mentioned in said paragraph eighth.

7. Denies that the plaintiffs in the above-entitled action have performed all or any of the conditions agreed to be performed by them to be performed.

8. Denies that said defendant, New York Dredging Company, has failed, neglected, or refused to perform the terms or conditions of the contract agreed by them to be performed, and denies that the plaintiff herein have been injured to their harm or damage in the sum of $57,338.22, or in any other sum, and denies that said sum or any other sum of money represents the difference between what the defendant, New York Dredging Company, agreed to perform the work of dredging for, and what it actually cost the plaintiffs to complete said work under the contract with P. Sanford Ross, or in any other way, and denies that either the sum of $31,750.00 accrued under said contract between said New York Dredging Company and the plaintiff, annexed to said complaint and marked "Exhibit C", as liquidated damages under the same.

60 I.

And for a further and separate answer and counterclaim in the above-entitled action, said defendant, New York Dredging Company, alleges:

1. Under and pursuant to the contract between the plaintiffs and said defendant, mentioned in the complaint herein annexed thereto and marked "Exhibit C," said defendant performed dredging work, to wit, 25,887 cubic yards, for which said plaintiffs agreed to pay said defendant at the rate of 15 cents per cubic yard, aggregating $3,883.05, and also performed other dredging work, to wit, 54,531 cubic yards, for which said plaintiffs agreed to pay said defendant at the rate of 99 cents per cubic yard, aggregating $53,985.59.

2. Said plaintiffs paid to said defendant for the dredging work performed as aforesaid the sum of $52,081.79, and no more, and there is now due and unpaid to the defendant in respect of said dredging work the sum of $5,786.85.

Wherefore said defendant, New York Dredging Company, prays judgment that the plaintiffs take nothing by their action against it,

and that said defendant have judgment against the plaintiffs for said sum of $5,786.85.

R. PERCY WRIGHT,
*Attorney for Defendant, New York Dredging Company.*

Services of a copy hereof is admitted and verification of said answer waived this 9th day of April, 1904.

MARSHALL B. WOODWORTH,
*Attorney for Plaintiff.*

61 (Endorsed:) Filed April 11th, 1904. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

In the Circuit Court of the United States for the Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING CO. ET AL., DEFENDANTS.

*Stipulation waiving jury.*

It is hereby stipulated that each of the parties in the above-entitled action waive a jury trial therein.

Dated at San Francisco, this 22d day of July, 1904.

MARSHALL B. WOODWORTH,
*U. S. Dist. Atty. and Atty. for Plff.*
R. PERCY WRIGHT,
*Atty. for Defts.*

(Endorsed:) Filed July 22, 1904. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the United States Circuit Court for the Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING CO. ET AL., DEFENDANTS.

62 *Stipulation for amendment of answers.*

It is hereby stipulated that the defendant, New York Dredging Company, in the above-entitled action, may amend its answer, by inserting after the figures $31,750.00, on line 14 of page 3, the words "or any other sum of money."

It is further stipulated that the defendants. J. McMullen and R. Percy Wright, in said action, may amend their answer by insert-

ing after the figures $31,750.00, on line 22 of page 3, the words "or any other sum of money."

Dated at San Francisco, this 20th day of Jany., 1905.

MARSHALL B. WOODWORTH,
*Attorney for Plaintiff.*

(Endorsed:) Filed January 20, 1905. Southard Hoffman, clerk. By W. B. Beaziley, deputy clerk.

At a stated term, to wit, the November term, A. D. 1904, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court room in the city and county of San Francisco, on Friday, the 20th day of January, in the year of our Lord one thousand nine hundred and five. Present: The Honorable William W. Morrow, circuit judge.

63 No. 13519.

THE UNITED STATES OF AMERICA
*vs.*
NEW YORK DREDGING CO. ET AL.

*Order continuing trial and granting leave to amend answers.*

By consent of the attorneys for the respective parties—C. M. Fickert, esq., assistant U. S. attorney, appearing on behalf of plaintiff, and R. Percy Wright, esq., appearing on behalf of defendants—it is ordered that this cause be and is continued to to-morrow for trial.

And upon motion of Mr. Wright, and pursuant to a stipulation in that behalf by him presented and filed, it is ordered that defendants herein may amend their answer in the particulars in said stipulation indicated.

At a stated term, to wit, the July term, A. D. 1906, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 9th day of July, in the year of our Lord one thousand nine hundred and six. Present: The honorable William W. Morrow, circuit judge.

64 No. 13519.

THE UNITED STATES
*vs.*
NEW YORK DREDGING CO. ET AL.

*Order substituting defendant.*

Upon motion of Robert T. Devlin, esq., U. S. attorney, and on his suggesting the death of R. Percy Wright, one of the defendants

herein, to the court, it is ordered that Joseph Stulz, administrator with the will annexed of the estate of said R. Percy Wright, deceased, be, and he hereby is, substituted as a defendant herein in place and stead of said R. Percy Wright, deceased.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

THE UNITED STATES
*vs.*
NEW YORK DREDGING COMPANY (A CORPORATION) ET AL.

*Stipulation [relative to facts].*

The following shall be added to the stipulation of facts herein:

65 I.

Paragraph XIII of the complaint is true.

ROBT. T. DEVLIN,
*Attorney for Plaintiff.*
BURKE CORBET,
*Attorney for Defendants, N. Y. Dredging Co. and John McMullen.*
E. J. LYNCH,
*Attorney for Executor of Estate of R. Percy Wright, Deceased.*

Service of the within stipulation by copy admitted this 7 day of July, 1906.

BURKE CORBET,
*Attorney for N. Y. Dredging Co., John McMullen.*

(Endorsed:) Filed July 23d, 1906. Southard Hoffman, clerk. By J. A. Schaertzer, deputy.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

THE UNITED STATES
*vs.*
NEW YORK DREDGING COMPANY (A CORPORATION) ET AL.

*Amendment to complaint.*

Paragraph XIII.

That the advertisement mentioned in paragraph seventh of the complaint was regularly made in the open market, and the same

66 was legally published by the plaintiff in three newspapers of general circulation, as follows:

Mail and Express, published in the city of New York.

News and Courier, published in the city of Charleston, South Carolina.

Palmetto Post, published in the city of Port Royal, South Carolina.

That P. Sanford Ross was the lowest bidder at said advertisement, and said contract for the completion of said work was regularly entered into between the United States Government and said P. Sanford Ross in the manner required by the laws and regulations of the United States for the doing of such work by contract, and the contract price was the lowest the Government could obtain through such bid. Said advertisement so published was as follows:

"Sealed proposals, endorsed 'Proposals for dredging' will be received at the Bureau of Yards and Docks, Navy Department, Washington, until 1 o'clock, May 11, 1901, and then and there publicly opened, for dredging at the naval station, Port Royal, S. C. Appropriation to be expended, $87,000. For plans, specifications, and forms of proposal address 'Commandant, Naval Station, Port Royal, S. C.' Mordecai T. Endicott, Chief of Bureau, Apr. 10, 1901."

That the plans and specifications referred to in said advertisement were the same as those set forth in the contract between the Government and P. Sanford Ross attached to the complaint.

67 The plaintiff at all times was able to perform, and had on hand the funds available to pay for the performance of the said contract between it and the defendants on its part, and was at all times ready and willing to have the same performed by defendants until the annulment thereof as alleged in the complaint.

RORT. T. DEVLIN,
*Attorney for Plaintiff.*

Due service admitted by copy this July 7th, 1906.

BURKE CORBET,
*Attorney for N. Y. Dredging Co. and John McMullen.*
E. J. LYNCH,
*Attorney for Executor of Estate of R. Percy Wright, deceased.*

Service of the within amendment to complaint by copy admitted this 7 day of July, 1906.

BURKE CORBET,
*Attorney for N. Y. Dredging Co. and John McMullen.*

Received copy of within amendment July 14, 1906.

E. J. LYNCH,
*Attorney for Joseph A. Stulz, administrator, etc., of Estate of R. Percy Wright, deceased.*

(Endorsed:) Filed July 23, 1906. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

68 At a stated term, to wit, the March term, A. D. 1908, of the Circuit Court of the United States of America of the Ninth Judicial Circuit, in and for the Northern District of California, held at the courtroom in the city and county of San Francisco, on Monday, the 13th day of April, in the year of our Lord one thousand nine hundred and eight. Present: The honorable William C. Van Fleet, district judge.

No. 13519.

THE UNITED STATES
*vs.*
NEW YORK DREDGING CO. ET AL.

*Order for judgment in favor of plaintiff.*

This cause having been heretofore submitted to the court for consideration and decision, and the same having been fully considered and the court having rendered its oral opinion, it is ordered, in accordance with said opinion, that judgment be entered herein in favor of the plaintiff and against the defendants, said New York Dredging Company, John McMullen and R. Percy Wright, in the sum of $25,588.02, together with interest thereon from December 5, 1903, and for costs.

69 In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Judgment.*

This cause having been heretofore regularly submitted to the court for consideration and decision upon the pleadings, agreed statements, and stipulations of facts, and the court, after due deliberation, having rendered its oral opinion and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the premises aforesaid, it is considered by the court that plaintiff do have and recover of and from New York Dredging Company, John McMullen, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants, the sum of thirty-three thousand three hundred eighty-nine and 52/100 (33,389.52)

dollars, together with its costs in this behalf expended taxed at
70 $———. As against the said defendant, Joseph A. Stulz, the said sum to be payable out of the estate of said R. Percy Wright, deceased.

Judgment entered April 13, 1908.

SOUTHARD HOFFMAN, *Clerk.*

A true copy. Attest:
[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. MALING, *Deputy Clerk.*

In the Circuit Court of the United States, Ninth Judicial Circuit, in and for the Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA
*vs.*
NEW YORK DREDGING COMPANY ET AL., ETC.

*Certificate to judgment roll.*

I, Southard Hoffman, clerk of the Circuit Court of the United States for the Ninth Judicial Circuit, Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the above-entitled action.

Attest my hand and seal of said Circuit Court this 13th day of April, 1908.
[SEAL.]

SOUTHARD HOFFMAN, *Clerk.*
By W. B. MALING, *Deputy Clerk.*

71 (Endorsed:) Judgment-roll. Filed April 13th, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Bill of exceptions.*

The above-entitled cause came duly on to be heard upon the 6th day of May, 1907, before the court sitting without a jury. A jury trial

was waived by stipulation in writing duly signed by the counsel for all the parties in the action, filed in the cause on July 25th, 1905, according to law. The cause was heard upon the pleadings and an agreed statement of facts, as follows:

72 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES, PLAINTIFF,
*vs.*
NEW YORK DREDGING CO. ET AL., DEFENDANTS.

*Agreed statement of facts.*

It is hereby stipulated by the respective parties in the above-entitled action that the following are facts in the case, in addition to those admitted by the pleadings.

I.

Representatives of the New York Dredging Company first appeared at the site of the work on November 22, 1897, and on the 26th day of said month work began by throwing up levees to retain material to be placed on shore. Work of this character and other preparatory work continued until March 6, 1898, when actual dredging began.

II.

The time fixed by the contract for the completion of the work was sixteen months from the date thereof, October 25, 1897.

III.

On January 23, 1899, the New York Dredging Company made application to the Navy Department for an extension of time
73 within which to complete the work of dredging at Port Royal Naval Station, and the following is a correct copy of said application:

NEW YORK, *Jan. 23, 1899.*

MORDECAI T. ENDICOTT,
*Chief of Bureau of Yards and Docks,*
*Washington, D. C.*

DEAR SIR: On October 25th, 1897, this company entered into a contract with the Bureau of Yards and Docks for dredging at Port Royal Naval Station, S. C. Up to the present time there has been delays caused by storms and accidents approximating 30 to 40 days. We have not gone into the details of the exact number of days.

The progress of the work thus far indicates that we will require a considerable extension of time on this contract owing to unforeseen hardness of the material and unforeseen difficulties in the execution of the work, and we therefore ask that extension of time be granted for completion of the work to December 30, 1900. This extension to cover all delays of every character that accrued prior to January 15, 1899.

Trusting that you will find it possible to grant us this extension, we remain,

Yours, truly,

NEW YORK DREDGING COMPANY,
By GEO. W. CATT, *President.*

IV.

On February 15, 1899, the time allowed by the contract for completing the work was, by the authority of the Secretary of the Navy, extended to December 30, 1899.

74 V.

On April 27, 1899, the contractors stopped the dredging operations under the contract, and under date of May 2, 1899, addressed a letter to the Chief of the Bureau of Yards and Docks asking for permission to deposit material dredged by dumping it in deep water instead of putting it on shore. After consideration and report by the engineer in charge of the work, the permission requested was denied, under date of May 12, 1899.

VI.

On June 9th and 10th, 1899, the contractors removed their plant from the naval station.

VII.

On July 18, 1899, the contractors again requested permission to deposit material in deep water, which request was denied, under date of August 5, 1899.

VIII.

On August 9, 1899, the Bureau of Yards and Docks directed that a survey be made of the work done by the contractors, and on the same date requested the sureties to take steps to secure the completion of the work.

IX.

On September 19, 1899, the engineer in charge of the work reported that the work which had been done by the contractors amounted to 92,297 cubic yards, of which 27,001 cubic yards were

earth and 65,296 cubic yards were rock, all of which were deposited on shore, leveled and graded, as required.

X.

75 On December 6, 1899, the contractors stated in letters of that date that they had been unable to arrange for continuing the work of depositing material on shore, but that they could readily arrange to have the work go ahead if allowed to deposit the material in deep water.

XI.

On February 21, 1900, the Bureau of Yards and Docks granted permission to the contractors to deposit the remainder of the material to be dredged under the contract in deep water in the harbor.

XII.

On February 23, 1900, the contractors acknowledged receipt of the permit to deposit material in deep water.

XIII.

On March 19, 1901, no further work having been done under the contract, the Bureau of Yards and Docks directed the appointment of a board of three officers to consider the status of the contract and report whether in their opinion the contract should be annulled and the work completed by the Government. On March 21, 1901, said board reported and recommended that the contract be annulled and that the work be completed by the Government. Accordingly, on May 25, 1901, the Navy Department declared said contract to be abrogated, and to be null and void, and the contractors and the sureties were notified by letters of that date, that the contract had been declared null and void, and that the work would be completed at their expense.

XIV.

76 The New York Dredging Company removed, under the contract set forth in the complaint herein, 80,413 cubic yards of material, of which 25,687 cubic yards were at the prices of 15 cents per cubic yards, and 54,531 cubic yards at the price of 99 cents per cubic yard; and no other or greater quantity of material was removed by said company under said contract.

The following statement shows the quantities actually removed per month from the signing of the contract to the time operations were suspended by the New York Dredging Company, viz:

| | | Cubic yards. | Total to date. |
|---|---|---|---|
| 1897. | November | None. | None. |
| | December | None. | None. |
| 1898. | January | None. | None. |
| | February | None. | None. |
| | March | 8,975 | 8,975 |
| | April | 2,775 | 11,750 |
| | May | 1,553 | 13,303 |
| | June | 6,858 | 20,161 |
| | July | 2,777 | 22,933 |
| | August | 7,493 | 30,431 |
| | September | 3,549 | 33,980 |
| | October | 7,559 | 41,539 |
| | November | 4,014 | 45,553 |
| | December | 2,695 | 48,248 |
| 1899. | January | 18,517 | 66,765 |
| | February | 5,434 | 71,199 |
| | March | 5,207 | 76,406 |
| | April | 4,012 | 80,418 |

No work was done after April, 1899.

77 The plaintiff has paid to the defendant, New York Dredging Company, for the dredging work performed as aforesaid the sum of $52,386.77 and no more.

XV.

After the abrogation of said contract, the Navy Department advertised for bids for the completion of the work mentioned in said contract, and a correct copy of said advertisement is set forth in the complaint herein.

XVI.

On or about May 21, 1901, P. Sanford Ross entered into the contract set forth in the complaint herein, and performed all of the covenants and conditions of said contract agreed by him to be performed.

XVII.

The quantity of material removed by P. Sanford Ross under his contract amounted to 69,043.9 cubic yards, which at the price of $1.25 per cubic yard, agreed to be paid to him, amounted to $86,304.87. Of this sum $85,978.71 were paid to Ross and $326.16 were paid to the government inspector. The amount paid to the New York Dredging Company, as before stated, was $52,386.77, making the total amount paid for work done under the two contracts $138,386.77.

The amount which would have been paid under the original contract had the total quantity of material been removed by the New York Dredging Company under the contract would have been $112,798.75, or $25,588.02.

XVIII.

78 Demand in writing has been made upon said defendant, New York Dredging Company, J. McMullen, and R. Percy Wright for the payment of said sum of $57,338.02, and no part or portion thereof has been paid.

XIX.

The quantity of work, labor, or services to be performed or done under said contract between the plaintiff and the defendant, New York Dredging Company, was not at any time fixed or determined by the Naval Department, except as appears from said contract or from the correspondence embraced in this stipulation.

XX.

The following are true copies of original letters addressed by the Naval Department to the defendant, and by the defendant to the Naval Department, and they correctly state the facts appearing therefrom:

[Copy. E. B. S.]

711–1899.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., February 15, 1899.*

GENTLEMEN: Your application of January 23, 1899, for an extension of time for the completion of the work of dredging at the Port Royal Naval Station, under your contract with this bureau dated October 25, 1897, has been received. The extension you requested is until the 30th of December, 1900.

2. The bureau has referred the application to the Port Royal
79 Naval Station for examination and report by the commandant and civil engineer in charge of the work, and it has been referred to the Navy Department with the bureau's recommendation in the matter. The department has acted upon the application to the following effect:

It appears from the papers herewith that the New York Dredging Company's work under its contract of October 25, 1897, for dredging at the Port Royal Naval Station, has been interrupted and delayed by circumstances beyond its control, such as storms and accidents to machinery, and that owing to the unforeseen hardness of the material to be removed and the unforeseen difficulties in the execution of the work, it has been impossible for the contractors to make

progress as expected though they have worked faithfully and well, only about one-third of the dredging having been done, while all but about two weeks of the whole contract time has been consumed.

The extension of time asked for, and recommended by the superintending civil engineer and the commandant of the naval station, namely, to December 31, 1900, is greater than the time originally limited by the contract, which was 16 months, and as it is not yet ascertained that all the remaining work will prove as difficult as that so far done, the department deems it inadvisable at this time to grant so great an extension, but as the contractors have been so much delayed, the time limited by the contract is, as recommended by the bureau, hereby authorized to be extended to December 30, 1899, the question of a further extension to be determined at that
80 time upon consideration of the work done and the delays and difficulties met with between now and said date.

3. You are, therefore, granted an extension of time for the completion of the work under the said contract to the 30th day of December, 1899, the question of any further extension to be determined in view of the situation as it may develop during further progress of the work.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY
(GEO. W. CATT, *Prest.*),
*World Building, New York, N. Y.*

[Copy. E. B. S.]

[Telegram.]

Received at Naval Station, Port Royal, S. C., Apr. 29, 1899. Dated New York.

To GEO. T. FIELD (*care Naval Sta.*).

Shut down work with Port Royal; have engineer make careful estimate of work done to date. We will have work done with another machine in future.

N. Y. DREDGING CO.

81 [Copy. E. B. S.]

[Telegram.]

MAY 2, 1899.

Dated Naval Station, Port Royal, S. C. 2.

To DOCKS, *Navy Dept., Washn., D. C.:*

New York Dredging Company has suspended work here, stating that they intend using a different dredge.

ROCKWELL.

[Copy. E. B. S.]

U. S. NAVAL STATION,
*Port Royal, S. C., May 2, 1899.*

GENTLEMEN: Your superintendent having suspended operations in compliance with your telegram of the 29th ultimo, I would be pleased to be informed as to what arrangements you are making to continue the work of dredging under your contract, viz, what method you propose to adopt for removing the material, and when you expect to resume.

Very respectfully,

(Signed) GEORGE MACKAY,
*Civil Engineer, U. S. N.,*
*Officer in Charge.*

NEW YORK DREDGING CO.,
*World Building, New York City.*

The COMMANDANT.

82 [Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y., May 2, 1899.*

MORDECAI T. ENDICOTT,
*Chief Bureau Yards and Docks, Washington, D. C.*

DEAR SIR: In the matter of dredging at the naval station, Port Royal, S. C., under contract dated October 25th, 1897, we submit you the following:

This company has been making the best endeavor possible to carry out the work covered by the contract, and after working steadily for 14 months conclude that it is not practical to continue the work with a dredge of hydraulic character. Up to the present time we have excavated approximately 80,000 cubic yards and deposited the same on the naval station, as provided for in the specifications and contract.

In executing this work the difficulties encountered have been so great that the loss to this company up to the present time is somewhere between $40,000 and $50,000. We do not think it practical or desirable to continue the work with the plant we now have on the work, and we wish to substitute another plant to continue and complete the contract.

To this end we respectfully ask that you grant permission for the remaining material to be dredged under the contract to be deposited subject to your requirements, but not to be deposited on the naval station.

83 In other words, we wish to be permitted to dredge the material, and deposit it at such points in deep water as may be deemed advisable and permissible by your department, and it is for permission to do this that we address this communication to you.

In any event we shall discontinue work with our present dredge.

After we receive advice from you that we can deposit the material in deep water at such points as you may require we will arrange to put on another dredge at the earliest date possible.

And you will note that there has already been deposited on the station approximately 80,000 cubic yards, while the amount actually contemplated when the contract was let was approximately 49,000 cubic yards.

Awaiting your advice, we remain, yours, truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

[Copy. E. B. S.]

3588–1899. DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., May 4, 1899.*

SIR: 1. The bureau encloses herewith copy of a letter dated the 2nd instant, from the New York Dredging Company, stating that they propose to discontinue use of their present dredge and provide another better adapted to the work. They request permission to dispose of material dredged, in deep water, instead of depositing it upon the naval station.

2. The bureau requests that it may receive a report in re-
84 gard to the filling and grading done under this contract, and what are the needs of the station in respect to any further work of this kind.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

The COMMANDANT,
*Naval Station, Port Royal, S. C.*
F. C. Enc.

[Copy. E. B. S.]

NEW YORK DREDGING CO.,
*World Building, New York, May 5th, 1899.*

GEORGE MACKAY, C. E., U. S. Navy,
*Officer in Charge, U. S. Naval Station, Port Royal, S. C.*

DEAR SIR: Your favor of May 2nd noted. In reply would say that we are making arrangements as fast as possible to put on another dredge on that work, which we hope will be more successful in its operation than the one used hertofore. In doing this we will wish to take the material away in scows and dump in deep water instead of putting it on the yard. The price for doing this is provided for in the contract at the same price in either case.

Yours, truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

85 [Copy. E. B. S.]

3588–1899.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., May 12, 1899.*

GENTLEMEN: Your letter of the 2d instant, requesting a change in the place of deposit of the material exacavated from the channel at the Port Royal Naval Station, under your contract dated October 25, 1897, has been received.

2. The bureau has caused a report to be made by the officers at the naval station of the state of the filling in which has been done under your contract and the extent of the filling and grading which it is desirable to have done in order to bring the entire surface to a uniform level.

3. The Government has taken steps to purchase additional lands immediately adjoining the present station, upon some portion of which you have had permission to fill in advance of title being taken by the Government. The Navy Department is now just advised by the Department of Justice that the titles to those lands are sufficiently clear for the payment of the money and entering into possession, which will be done at once. For this reason the bureau considers it very desirable that the material yet to be excavated by you under the terms of your contract should be deposited upon these lands, in order to bring them up to the proper grade.

4. The commandant of the station reports that the tracts of
86 land in question will require about 77,000 cubic yards of filling, and it seems probable, therefore, that practically all the material yet to be dredged by you is needed upon the station. The bureau is, therefore, unable to grant your request to deposit this material elsewhere.

5. Referring to the last paragraph of your letter, in regard to the amount contemplated by the contract to be placed on the station, 49,000 cubic yards, the Government reserved the right to increase or decrease this amount to any extent. This provision occurs in paragraph 6 of the specifications, which refers to the proposition to increase the area of the station by purchasing additional lands, and the amount to be deposited was left to be changed in view of such purchase.

6. The bureau regrets that it cannot comply with your request in this matter.

Very respectfully,
(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

H. V. C.

[Copy. E. B. S.]

4663–1899.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., June 12, 1899.*

GENTLEMEN: The bureau is in receipt of a report from the
87 Port Royal Naval Station that you are removing from that station your dredging plant and all other property, namely, buildings, coal, etc., and that the machine left on the 9th instant for Savannah, Georgia, the pantoons, discharge pipes, lighters, etc., to follow.

2. In view of this report the bureau requests to be informed what steps you are taking, if any, towards the prosecution of this work by some other method, of which, in a personal interview some weeks ago, one of your officers indicated an intention.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

H. V. C.

[Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y., June 14, 1899.*

MORDECAI T. ENDICOTT,
*Chief Bureau of Yards and Docks, Washington, D. C.*

DEAR SIR: Replying to your letter of June 12th, we beg to state:

First. That the rock dredging plant with which we had made arrangements to proceed with the Port Royal contract would not require the use of any of the plant which we have removed therefrom.

Second. A contract had been closed and signed for the com-
88 pletion of the work, when additional difficulties created by your department itself rendered inadequate the terms of said subcontract.

Efforts are now being made to adjust the difficulty in some adequate way. As soon as we can definitely report a settlement of the problem we will do so.

Yours, truly,

NEW YORK DREDGING CO.,
(Signed) H. S. WOOD, *Engr.*

[Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, July 18, 1899.*

MORDECAI T. ENDICOTT,
*Chief Bureau Yards and Docks, Washington, D. C.*

DEAR SIR: Since receiving your communication of May 12th, in reply to our request of the 2d of May, for permission to deposit material excavated at Port Royal Naval Station, S. C., we have been trying to find a way by which we could possibly do the work and yet deposit all of the material ashore. We have not been able to find a way of doing this that would be at all satisfactory. The work that has already been done under the contract (all of the material being deposited ashore) has cost between 70 and 80 per cent more than we got for the work, and it became impossible for us to go on in this way, although we had on the work the most efficient hydraulic dredging plant in existence for doing such work, and since shutting down that machine we have been trying to find a method of doing the work that would enable us to proceed and deposit the material on the
89 island, but have not been able to do so. If the Government can see its way to grant us permission to deposit the material in deep water, we are prepared to go ahead and carry out the contract, although even by doing it in this manner will cost us more than we actually get for the work, but this is not nearly so difficult as to undertake to deposit the material on the island.

While under the contract and specifications for doing this work the Government had the option of requiring that all of the material be placed ashore, yet the actual amount required for at the time contract was let was 49,000 cubic yards, approximately. Under the contract there has actually been deposited on the yard between 75,000 and 80,000 cubic yards. The actual cost of doing the work for the Government will be the same whether the material is deposited ashore or deposited in deep water, as the price at which we took the work was identical in either case; and at time contract was let it was contemplated that part of the material would be taken to deep water, as the Government only agreed to take 49,000 cubic yards on the yard.

Having deposited on the yard the amount we have, we hardly think you should require us to do this at a loss when it was originally contemplated that a large portion of the material would be taken away.

We respectfully ask you to again refer to our letter of May 2d, 1899, and see if you cannot see your way clear to allow us to deposit the remainder of this material in deep water instead of putting it ashore.

90 If this request (which we deem entirely reasonable) is granted, we will make the best endeavor possible to proceed with the work and carry the same to a successful termination.

As the matter now stands, with the department insisting on all of the material being deposited ashore, we are unable to see any way by which we can continue the work at present.

Awaiting your further advice in this matter, we remain,

Yours, truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

[Copy. E. B. S.]

5627–1899. H. V. C.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., August 5, 1899.*

GENTLEMEN: The bureau has received your letter of the 18th ultimo, making application the second time to be allowed to take the material dredged under your contract for work at the Port Royal Naval Station to sea instead of depositing it upon the island.

2. The bureau has given the matter due consideration and can only repeat that the interests of the Government require that all the dredged material be put ashore in accordance with the terms of the specification, leaving it optional with the Government to have more so deposited than was mentioned therein as the probable
91 amount. The price for material deposited on shore is the same as that for material disposed of otherwise, and the bureau feels that in requiring all of it to be placed on shore it is not departing in any respect from the letter or spirit of the contract and specifications. There are conditions existing at the station which render it important that the material excavated shall be so used, and the bureau cannot find it consistent with its duty to release you from the obligation to so place it, as previously required.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

[Copy. E. B. S.]

6056. H. V. C.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., August 9, 1899.*

SIR: The New York Dredging Company, under its contract dated October 25, 1897, for dredging at the United States Naval Station, Port Royal, South Carolina, commenced operations on March 3, 1898, and continued until April 27, 1899, since which time no work has been done and their plant has been wholly removed from the station.

2. The contract provided for placing the material dredged upon the shore or disposing of it by removal from the station, at the option of the Government, the price in either case being the
92 same. The specifications stated that the amount to be deposited on shore was about 49,000 cubic yards, but that the Government might reserve the right to increase this to any amount. The Government elected to have all the material placed on shore, and, up to the time when the company discontinued work, a total of 80,418 cubic yards had been excavated and deposited upon the station. The company has stated to this bureau that unless it will allow them to dispose of the balance of the material by removing it from the station they will be unable to proceed with the work. The bureau has declined to grant their request and has requested them to proceed with the work, depositing the material on shore.

3. The bureau informs you of the situation under this contract because you are one of the bondsmen under the same. It trusts that you will take measures to endeavor to secure the completion of the work by the contractors or secure to the Government its completion under your own personal supervision.

4. Please acknowledge the receipt of this letter and state whether you will take steps to have the work continued.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

Mr. JOHN McMULLEN,
*42 Market Street, San Francisco, Cal.*

A letter of the same tenor was addressed to R. Percy Wright and the other bondsmen.

93 [Copy. E. B. S.]

SAN FRANCISCO BRIDGE COMPANY,
42 MARKET STREET,
*San Francisco, Cal., Aug. 15, 1899.*

SIR: Your letter of August 9th received and carefully noted. Before I can reply fully to the same it will be necessary for me to confer with the officers of the New York Dredging Company, which I shall do to-day's mail, and will fully answer your communication as soon as I have a reply to my letter from that company.

I have no doubt, however, that the company will carry out its contract with the Government in the premises.

Yours, truly,

(Signed) J. McMULLEN.

To Admiral MORDECAI T. ENDICOTT,
*Chief of Bureau of Yards & Docks,*
*Navy Department, Washington, D. C.*

[Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
WORLD BUILDING,
*New York, September 9, 1899.*

MORDECAI T. ENDICOTT,
*Chief Bureau Yards and Docks,*
*Washington, D. C.*

DEAR SIR: Reference to continuing the dredging work at the Port Royal Naval Station, would say that we are endeavoring to secure some method by which to carry out the contract and hope to
94 be able to report something favorable to you in the near future.

Yours, truly, NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

[Copy. E. B. S.]

6065—1899. HVC.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., October 12, 1899.*

GENTLEMEN: Under date of September 9, 1899, you reported to the bureau that you were endeavoring to secure some method by which to carry out the contract for dredging at the Port Royal Naval Station, and hoped to be able to report something favorable in the near future.

2. The bureau would be pleased to know whether your arrangements have been perfected and how soon it may expect to have the work resumed. Reports from the yard as late as the 4th instant do not show any indication of resumption.

Very respectfully,
(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

95 [Copy. E. B. S.]

6056–1899. H. V. C.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., November 6, 1899.*

GENTLEMEN: Upon the 12th of October last the bureau wrote you requesting to be informed whether your arrangements had been perfected for continuing the work of dredging at the Port Royal Naval Station under your contract, and how soon it might expect to have the work resumed. Up to the present time you have not replied.

Please inform the bureau at once as to your situation under this contract.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

[Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, December 6th, 1899.*

M. T. ENDICOTT,
*Chief Bureau Yards and Docks, Washington, D. C.*

DEAR SIR: Your letter of November 6th duly received. We do not wish to seem discourteous in not having replied to your last two letters reference to dredging at Port Royal Naval Station,
96 but this company has been trying ever since the dredge operating there was taken away, on account of being unable to handle the material satisfactorily, to secure some method by which to carry out the contract that would prove available for doing the work. We have not been able to get the matter satisfactorily arranged as yet.

We could readily arrange to have this work go ahead if the bureau had seen fit to allow the material to be towed away instead of put ashore, and still think the bureau is unreasonable in insisting that all of this material should be put ashore.

We cannot yet name a day when we can start work.

We remain, yours, truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

[Copy. E. B. S.]

6056.

BUREAU OF YARDS AND DOCKS,
NAVY DEPARTMENT,
*Washington, D. C., February 21, 1900.*

GENTLEMEN: Your letter of December 6 last was received by the bureau, stating that you had not been able up to that time to make any arrangement to handle the material satisfactorily under your contract of the 25th of October, 1897, with this bureau for dredging at Port Royal and place the material on shore. In this you
97 also renewed your request that you might be allowed to put the remainder of the material elsewhere than on the station, saying that you could readily arrange to have the work go ahead if the bureau should so allow.

2. In consideration of the fact that the contract with you estimated the amount to be placed on shore at 49,000 cubic yards, although it reserved the right to make this quantity more or less, and in further consideration of the fact that you have, up to the present

time, dredged and placed on shore a quantity about 80 per cent in excess of this, the bureau has concluded, under all the circumstances, to have the remainder of the material under your contract disposed of by depositing it in the harbor or any place allowable under the regulations governing the deposit of material in that vicinity.

3. The bureau requests, therefore, that you will complete arrangements at once and go ahead with the work on this basis, informing the bureau promptly of the progress and completion of the arrangement.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y.*

98 [Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, Feby. 23, 1900.*

Admr. M. T. ENDICOTT,
*Chief of Bureau of Yards and Docks, Washington, D. C.*

DEAR SIR: Your letter of the 21st inst., modifying the position of the department as heretofore held, reference to dispositions of material at Port Royal, received.

We are very glad to receive this modification of the bureau's requirements and will make the best endeavor possible to carry out the work. Suffice to say that when we formerly asked to be allowed to dispose of material in the manner which you now approve of, we could then have made arrangements for carrying the work forward immediately. It may now take some time before we can get arrangements made to carry out the work, but we will give the matter our best attention and advise you further as soon as we have any definite information to convey.

We remain, yours truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

99 [Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y., July 5, 1900.*

Admr. M. T. ENDICOTT,
*Chief of Bureau of Yards and Docks,*
*Washington, D. C.*

DEAR SIR: Your letter of June 30th, reference to resuming dredging at the Port Royal Naval Station, S. C., received.

We hoped to be able to get a plant on this work before this, but matters beyond our control prevented us doing so as yet. Furthermore, from the laws passed in the navy bill at last session of Con-

gress, we had supposed that possibly the bureau would not care to complete this work, at least that they would not care to complete the work of the yard was to be removed to another place. If this work is not to be completed we would be pleased to take up with the bureau an adjustment of the matter that will be mutually satisfactory.

Kindly advise us about this matter, and oblige,

Yours, truly,

NEW YORK DREDGING CO.,
(Signed) By O. L. WILLIAMS, *Secy.*

100 [Copy. E. B. S.]

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y., October 10, 1900.*

MORDECAI T. ENDICOTT,
*Chief Bureau of Yards and Docks,*
*Washington, D. C.*

DEAR SIR: We have for some time been making the best endeavor possible to get satisfactory plant and suitable arragements made for carrying on the contract for dredging at Port Royal Naval Station, dated October 25th, 1897. We have now made the necessary arrangements for carrying on this work to completion. To do this, however, will entail a considerable loss on our part.

We have made arrangements with P. Sanford Ross (Incorporated) to carry on the work with the same plant that was recently used at Port Royal in doing some other work.

During the time we have been trying to make satisfactory arrangements for carrying on the work the time for completion of the contract has lapsed.

We request that you grant us extension of time of doing this work until December 31, 1901, as this is the time estimated by P. Sanford Ross (Incorporated) to be necessary to execute the work yet remaining to be done under the contract.

Furthermore, in carrying out the work of completing the contract we wish to deposit the material as provided in the contract and as approved by the bureau in its letter dated February 21, 1900;
101 that is, by depositing all the material at such points as you may designate other than on the island, and in such a way as it could be towed to the place of deposit by scows.

We therefore request that you designate at what points, other than on the island, the deposit may be made, as near as practicable to the place where the excavation is to be made.

If you can grant this extension of time we will have the extension of time properly approved by the bondsmen to the contract.

Trusting that you can advise us definitely about the matter herein requested, so we can get ahead with the work at once, we remain,

Yours, truly,

NEW YORK DREDGING CO.
(Signed) By J. WILLIAMS MACY, *Prest.*

[Copy. E. B. S.]

6056. H. L. T.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., March 25, 1901.*

GENTLEMEN: It appearing that you have failed on your part to perform the contract between yourselves, as parties of the first part, and the United States, by E. C. Matthews (Chief of the Bureau of Yards and Docks), acting under the direction of the Secretary of the Navy, party of the second part, dated October 25, 1897, for dredging at the Naval Station, Port Royal, South Carolina, which dredging was to have been completed within sixteen calendar months
102 from the date of said contract, the party of the second part, exercising the option reserved to them, declare said contract null and void, without prejudice to their right to recover for defaults therein or violation thereof.

Please take notice that an advertisement will be prepared and issued inviting proposals to complete the work under the aforesaid contract, and that said work will be completed at your expense.

Very respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y. (as principal).*
Mr. JOHN McMULLEN,
*42 Market street, San Francisco, Cal. (as cosurety).*
Mr. R. PERCY WRIGHT,
*San Francisco, Cal. (as cosurety).*

[Copy. E. B. S.]

6056. I. K.

DEPARTMENT OF THE NAVY,
BUREAU OF YARDS AND DOCKS,
*Washington, D. C., February 25, 1903.*

GENTLEMEN: Referring to the contract dated October 25, 1897, between yourselves and the United States for certain dredging at the naval station, Port Royal, S. C., and to the bureau's letter of
103 March 25, 1901, declaring said contract null and void, and advising you that the work would be completed at your expense, you will please take notice that the work covered by the contract has been completed at a cost of $25,588.02 over and above the original contract price; also that the liquidated damages which have accrued under the aforesaid contract aggregate $31,750.00, making your total indebtedness to the United States on account of said contract $57,338.02, which sum you are hereby called upon to remit to the United

States by deposit in the United States Treasury to the credit of the Secretary of the Navy.

You are requested to acknowledge receipt of this communication.

Yours, respectfully,

(Signed) MORDECAI T. ENDICOTT,
*Chief of Bureau.*

NEW YORK DREDGING COMPANY,
*World Building, New York, N. Y. (as principal).*
Mr. JOHN McMULLEN,
*Market Street, San Francisco, Cal. (as cosurety).*
Mr. R. PERCY WRIGHT,
*San Francisco, Cal. (as cosurety).*

Paragraphs 1, 2, 3, 4, 8, and 10 of the complaint are admitted by the answers of the defendant to be true.

104 Dated San Francisco, this 20th day of January, 1905.

MARSHALL B. WOODWORTH,
C. M. FICKERT,
*Attorneys for Plaintiff.*
R. PERCY WRIGHT,
*Attorney for Defendants.*

(Endorsed:) Filed January 23, 1905. Southard Hoffman, clerk. By W. B. Beaizley, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District or California.

No. 13519.

THE UNITED STATES
*vs.*
NEW YORK DREDGING COMPANY (A CORPORATION) ET AL.

*Stipulation (relative to facts).*

The following should be added to the stipulation of facts herein:

I.

Paragraph XIII of the complaint is true.

ROBT. T. DEVLIN,
*Attorney for Plaintiff.*
BURKE CORBET,
*Attorney for Defendants,*
*N. Y. Dredging Co. and John McMullen.*
EDW. J. LYNCH,
*Attorney for Executor*
*of Estate of R. Percy Wright, Deceased.*

105 (Endorsed:) Filed July 23, 1906. Southard Hoffman, clerk. By J. A. Schaertzer, deputy.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

UNITED STATES OF AMERICA
*vs.*
NEW YORK DREDGING COMPANY ET AL.

*Supplemental stipulation and stipulation correcting agreed statement of facts.*

It is hereby stipulated between the parties to this action:

1. That the date, May 25, 1901, in paragraph XIII of the agreed statement of facts be changed to read "March 25, 1901."

2. That the number, 80,413 cub. yds., mentioned in line 2 of paragraph XIV of said statement be corrected to read 80,418 cub. yds.

3. That the number, 25,687, mentioned in line of the same paragraph be corrected to read 25,887.

4. That the number, 5,434, mentioned in the fourth line from the bottom of the fifth page of said statement in the said paragraph XIV be corrected to read 4,434.

5. That the sum, $52,386.77, mentioned in paragraphs XIV and XVII of said statement be corrected to read $52,081.90.

6. That the following words be added to paragraph XVII at the end thereof: "less than for the same work under the two contracts."

106 7. That the said amount paid under the said contract with said New York Dredging Company was paid in accordance with the provisions of said contract.

8. Representatives of the United States and the contractor, New York Dredging Company, found material required to be dredged by the New York Dredging Company under its contract much harder than it was believed to be by the contractor, New York Dredging Company, and by the representatives of the United States when the contract was originally entered into in October, 1897. Difficulties in the execution of the work under the contract of New York Dredging Company were met with which were not expected by the contractor, New York Dredging Company, or representatives of the United States when the contract was entered into. This unforeseen hardness of material and these unforeseen difficulties in execution were known to the contractor, New York Dredging Company, and to the representatives of the United States on February 15, 1899, the date of

the letter set forth at page 8 of the original agreed statement of facts.

Dated March 5th, 1907.

ROBT. T. DEVLIN,
*Attorney for Plaintiff.*
BURKE CORBET,
CORBET & SELBY,
*Attorneys for Defendants, New York Dredging Company and John McMullen.*
EDW. J. LYNCH,
*Attorney for Administrator of Estate of R. Percy Wright, deceased.*

107 (Endorsed:) Filed April 2, 1907. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

This cause having been submitted to the court for its judgment, on the pleadings and the agreed facts, and having been duly considered by the court, it made and entered its judgment and order herein on April 13th, 1908, which said judgment was in favor of the plaintiffs, and against all the defendants, and for the principal sum of $25,588.02, together with interest thereon from December 5th, 1903, amounting to $7,801.50.

After the entry of said judgment, and within the time allowed by law, the said defendants duly and regularly prepared and served their proposed bill of exceptions upon said judgment.

The foregoing bill of exceptions is full, true, and correct, and the undersigned attorneys for the parties to said action hereby stipulate that the same may be settled and allowed as full, true, and correct.

ROBT. T. DEVLIN,
*Attorney for Plaintiffs.*
BURKE CORBET,
*Attorney for Defendants, John McMullen and New York Dredging Co.*
EDWARD J. LYNCH,
*Attorney for Defendant, Joseph A. Stultz, as Administrator, etc.*

*Judge's certificate to bill of exceptions.*

I hereby certify that the foregoing bill of exceptions is full,
108 true, and correct, and the same is hereby settled and allowed as the bill of exceptions upon the final judgment in the above-entitled case.

Dated May 27th, A. D. 1908.

WM. C. VAN FLEET, *Judge.*

(Endorsed:) Filed May 28, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN, AND Joseph A. Stultz as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Petition for writ of error and supersedeas.*

Now come John McMullen, and Joseph A. Stultz as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants herein, by their prospective attorneys, and complain, that in the record and proceedings had in said cause, and in the rendition of the judgment herein entered on or about April 13, 1908, certain errors hath happened, to the great damage of said defendants, all of which will more in detail appear from the assignment of errors which is filed with this petition;

109 Wherefore, these defendants, and each of them, pray for an order allowing said defendants to prosecute a writ of error to the honorable the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this case, duly authenticated, may be sent to said Circuit Court of Appeals for the Ninth Circuit, and for an order fixing the amount of bond for a supersedeas in said cause, and that, upon the giving of such bond, all further proceedings in this court be suspended and stayed until a determination of said writ of error in the United States Circuit Court of Appeals for the Ninth Circuit.

And your petitioners will ever pray.

Dated this 2 day of June, A. D. 1908.

BURKE CORBETT,
*Attorney for Defendant John McMullen.*
E. J. LYNCH,
*Attorney for Defendant Joseph A. Stultz, as administrator with the will annexed of the estate of R. Percy Wright, deceased.*

(Endorsed:) Filed July 9, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

110 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

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|---|---|
| THE UNITED STATES OF AMERICA, PLAINTIFF, *vs.* NEW YORK DREDGING COMPANY, JOHN McMULLEN, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants. | No. 13519. |

*Assignment of errors.*

The defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, in connection with the petition for a writ of error, come now and say, that in the record and proceedings in the above-entitled matter, there is manifest error in this, to wit:

1. The Circuit Court of the United States, Ninth Circuit, Northern District of California, erred in rendering judgment and determining upon the pleadings and the agreed statement of facts, the said cause, in favor of the plaintiffs and against the defendants, New York Dredging Company, John McMullen, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased.

2. The said court erred in determining and deciding, upon
111 the pleadings and the agreed statement of facts, that the extension of the time for the performance of the contract by the New York Dredging Company, without the consent of John McMullen and R. Percy Wright, did not release said John McMullen and R. Percy Wright from the bond securing the performance of said contract, and all liability incurred by John McMullen and R. Percy Wright by said bond and contract.

3. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that by their signing the original contract, dated October 25th, 1897, John McMullen and R. Percy Wright consented to the extension of the time of performance of said contract thereafter made.

4. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the original contract, dated October 25th, 1897, provided that the time for the performance thereof might be extended without notice to or knowledge of the sureties, John McMullen and R. Percy Wright.

5. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the alteration of the contract, dated October 25th, 1897, by the extension of the time for the performance thereof, without the consent of the sureties, did not release said sureties.

6. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the alterations of

the original contract, dated October 25th, 1897, as to disposal
112 of the material dredged, made without the consent of the sureties, John McMullen and R. Percy Wright, did not release said sureties. Said alterations were the following: The original contract contemplated the excavation of approximately 1,000,000 cu. yds., and the placing on shore of approximately 49,000 cu yds., or about one-twentieth of the amount excavated. The contract executed required the excavation of only 149,461.9 cu. yds., and the placing on shore of about 80,418 cu. yds., or over one-half of the total actually excavated.

7. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the abrogation of the original contract by the plaintiffs, without any reservation of the right given thereunder to complete the work under the contract and recover the cost of completion from the New York Dredging Company and its sureties, did not deprive plaintiffs of the rights secured by the contract to complete the work and recover the costs of completion from the New York Dredging Company and its sureties.

8. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the plaintiffs, after annulling the contract between plaintiffs and the New York Dredging Company, as principal, and John McMullen and R. Percy Wright, as sureties, without reservation, thereafter had the right to complete the work of dredging under said contract, and collecting from New York Dredging Company and its sureties the
113 difference between the cost of completing said contract, under the original contract, and the sum actually expended by the plaintiffs for its completion.

9. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the plaintiffs have been damaged in the sum of twenty-five thousand five hundred eighty-eight and two-hundredths dollars ($25,588.02) by the failure of New York Dredging Company to complete its contract with plaintiffs, dated October 25th, 1897.

10. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that by the original contract, dated October 25th, 1897, it was provided that the time for the performance thereof might be extended beyond the date therein fixed for such performance, without the knowledge or consent of the sureties, John McMullen and R. Percy Wright, to such extension of time, without releasing said sureties from their obligation under said contract and the bond thereto attached.

11. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the amount to be dredged under the original contract, dated October 25th, 1897, might be reduced from one million (1,000,000) cubic yards to 149,461 cubic yards, without the knowledge or consent of the sureties, John McMullen and R. Percy Wright, without releasing said sureties from their liability on account of said contract and the bond thereto attached.

12. The said court erred in determining and deciding, upon
114 the pleadings and the agreed statement of facts, that the amount of material to be dredged and placed on shore, under the original contract dated October 25th, 1897, could be increased from forty-nine thousand (49,000) cubic yards to eighty thousand four hundred and eighteen (80,418) cubic yards, without the knowledge or consent of the sureties, John McMullen and R. Percy Wright, without releasing them from their liability on account of said contract and the bond attached thereto.

13. The said court erred in determining and deciding, upon the pleadings and the agreed facts, that the time for the performance of the original contract, dated October 25th, 1897, was extended only for reasons provided for the terms of said contract.

14. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that by signing the original contract between the plaintiffs and New York Dredging Company, in addition to signing the bond attached to said contract, said sureties, John McMullen and R. Percy Wright, thereby consented in advance to the change in said contract as to the time of performance thereof, viz, the change whereby the time of performance was, on February 15th, 1899, increased from February 25th, 1899, the original date for the completion of said contract, to December 30th, 1899.

15. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the alteration of the original contract, made on or about February 20th, 1900, by
115 which alteration it was agreed by the plaintiffs and the New York Dredging Company, that no materials dredged should be placed on shore, did not release said sureties, John McMullen and R. Percy Wright, from all obligation on account of their bond attached to the original contract.

16. The said court erred in determining and deciding upon the pleadings and the agreed statement of facts, that defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, were liable to the plaintiffs in the sum of twenty-five thousand five hundred eighty-eight and two-hundredths dollars ($25,588.02), with interest from December 5th, 1903, even if said defendant, New York Dredging Company, were properly liable to the plaintiffs for said sum.

17. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that plaintiffs sustained damages in the amount of $25,588.02 by reason of the failure of New York Dredging Company to fully perform the contract dated October 25th, 1899.

18. The said court erred in determining and deciding, on the pleadings and the agreed statement of facts, that the sureties, John McMullen and R. Percy Wright, were not released from their bond by the alteration of the original contract, consisting in the plaintiffs chang-

ing the conditions of the contract requiring material dredged to be placed on shore, and being made on or about February 20th, 1900.

116 19. The said court erred in determining and deciding, upon the pleadings and the agreed statement of facts, that the extension of time of performance of the contract from February 15th, 1899, to December 30th, 1899, and the agreement that no materials dredged after February 20th, 1900, should be placed on shore and the reduction of the amount to be dredged from about 1,000,000 cu. yds. to about 150,000 cu. yds. and increasing the amount to be deposited on shore from about 49,000 cu. yds. to 80,418 cu. yds. did not materially alter the contract dated October 25th, 1897.

Wherefore, said defendants pray that the judgment of said court be reversed.

Dated this 2 day of June, A. D. 1908.

BURKE CORBET,
*Attorney for defendant, John McMullen.*
E. J. LYNCH,
*Attorney for defendant, Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased.*

(Endorsed:) Filed July 9, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

117 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
NEW YORK DREDGING COMPANY, A CORPORATION, John McMullen, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, substituted for R. Percy Wright.

*Order allowing writ of error.*

The defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, having filed herein and presented to the court their petition praying for a writ of error, and assignment of the errors intended to be urged by them, praying also that the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises, on consideration whereof,

The court does allow the writ of error to have reviewed the said judgment by the said United States Circuit Court of Appeals for

the Ninth Judicial Circuit, and that the amount of the bond
118 on said writ of error be, and hereby is, fixed at forty thousand dollars ($40,000).

Dated this 9th day of July, A. D. 1908.

W. C. VAN FLEET, *Judge.*

(Endorsed:) Filed July 9, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN, and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Order fixing amount of bond on writ of error.*

The defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, having this day filed their petition for a writ of error from the decision and judgment thereon, made and entered herein, to the United States Circuit Court of Appeals in and for the Ninth Judicial Circuit, together with an assignment of errors, within due time, and also praying that an order be made fixing the amount of security which defendants, John McMullen and Joseph A. Stulz, as
119 administrator with the will annexed of the estate of R. Percy Wright, deceased, should give and furnish upon said writ of error, and that, upon the giving of said security, all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial Circuit; and said petition having this day been duly allowed,

Now, therefore, it is ordered, that, upon the said defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, filing with the clerk of this court a good and sufficient bond in the sum of forty thousand dollars ($40,000), to the effect that if the said defendants, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, and plaintiffs in error, shall prosecute the said writ of error to effect, and to answer all damages and costs, if they fail to make their plea good, then the said obligation to be void, else to remain in full force and virtue (the said bond to be approved by the court), that all further proceedings in this court be and they are hereby suspended and stayed

until the determination of said writ of error by the said United States Circuit Court of Appeals.

Dated this 9th day of July, A. D. 1908.

W. C. VAN FLEET, *Judge.*

(Endorsed:) Filed July 9, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

120 In the Circuit Court of the United States, Ninth Circuit, Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA, PLAINTIFFS,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Bond on writ of error.*

Know all men by these presents, that we, John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, as princ'pals, and Anson S. Blake and F. W. Bilger, as sureties, are held and firmly bound unto the United States of America, plaintiffs above named, in the sum of forty thousand dollars ($40,000), to be paid to the said the United States of America, its successors or assigns, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents.

Sealed with our seals, and dated the 3d day of June, A. D. 1908.

Whereas, the above-named defendants, John McMullen and
121 Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, have sued out a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the United States for the Northern District of California.

Now, therefore, the condition of this obligation is such, that if the above-named John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, shall prosecute said writ to effect, and answer all costs and damages if they shall fail to make good their plea, then this obligation shall be void; otherwise to be and remain in full force and virtue.

JOHN McMULLEN. [SEAL.]
By BURKE CORBET, *His Attorney.*
JOSEPH A. STULZ, [SEAL.]
*Administrator with the will annexed of R. Percy Wright, deceased.*
ANSON S. BLAKE. [SEAL.]
F. W. BILGER. [SEAL.]

STATE OF CALIFORNIA,
*County of Alameda, ss:*

On this 3d day of June, in the year A. D. 1908, before me, H. E. Johnston, a notary public in and for the said county and State, personally appeared Anson S. Blake and F. W. Bilger, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged that they executed the same.

122 Witness my hand and official seal the day and year in this certificate first above written.

[SEAL.] H. E. JOHNSTON,
*Notary Public in and for the County of Alameda, State of California.*

STATE OF CALIFORNIA,
*County of Alameda, ss:*

Anson S. Blake and F. W. Bilger, of the city of Oakland, county of Alameda, State of California, being first duly sworn according to law, each for himself, deposes and says: That he is a resident and householder within the Northern District of California, Ninth Judicial Circuit of the Circuit Court of the United States of America, and that he is worth the sum of forty thousand dollars ($40,000), over and above all of his debts and liabilities, exclusive of property exempt from execution.

ANSON S. BLAKE.
F. W. BILGER.

Subscribed and sworn to before me this 3d day of June, A. D. 1908.

[SEAL.] H. E. JOHNSTON,
*Notary Public in and for the County of Alameda, State of California.*

Sufficiency of sureties on the foregoing bond approved this 9th day of July, A. D. 1908.

W. C. VAN FLEET, *Judge.*

123 We are satisfied of the sufficiency of the sureties on the within bond.

July 9, 1908.

ROBT. T. DEVLIN,
*U. S. Attorney.*
GEO. CLARK,
*Asst. U. S. Attorney.*

(Endorsed:) Filed July 9, 1908. Southard Hoffman, clerk. By W. B. Maling, deputy clerk.

In the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 13519.

THE UNITED STATES OF AMERICA, PLAINTIFF,
*vs.*
NEW YORK DREDGING COMPANY, JOHN McMULLEN and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, defendants.

*Clerk's certificate to transcript of record.*

I, Southard Hoffman, clerk of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California, do hereby certify the foregoing one hundred and eleven (111) pages, numbered from 1 to 111, inclusive, to be a full, true, and correct copy of the record and proceedings in the above and therein entitled cause, as the same remains of record and
124 on file in the office of the clerk of said court, and that the same constitutes the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $65.20; that said amount was paid by Burke Corbet, attorney for defendants; and that the original writ of error and citation issued in said cause are hereto annexed.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Circuit Court, this 31st day of August, A. D. 1908.

[SEAL.] SOUTHARD HOFFMAN,
*Clerk of the United States Circuit Court, Ninth Judicial Circuit, Northern District of California.*

*Writ of error (original).*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the judges of the Circuit Court of the United States for the Ninth Circuit, Northern District of California, greeting:*

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error, and the United States of America, defendant in error, a manifest error hath happened to the great damage of the said John McMullen and Joseph A.
125 Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error, as by their complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the seventh day of August next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 9th day of July, in the year of our Lord one thousand nine hundred and eight.

[SEAL.] SOUTHARD HOFFMAN,
*Clerk of the Circuit Court of the United States for the Ninth Circuit, Northern District of California.*

Allowed by

W. C. VAN FLEET, *Judge.*

126 Service of within writ and receipt of a copy thereof is hereby admitted this 9th day of July, 1908.

ROBT. T. DEVLIN,
*Attorney for Defendant in Error.*

The answer of the judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the Northern District of California.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said court, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the court.

[SEAL.] SOUTHARD HOFFMAN, *Clerk.*

(Endorsed:) No. 13519. Circuit Court of the United States, Ninth Circuit, Northern District of California. John McMullen et al., plaintiffs in error, vs. United States of America, defendant in error. Writ of error. Filed July 9th, 1908. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

*Citation on writ of error (original).*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the United States of America, greeting:*

You are hereby cited and admonished to be and appear at a
127 United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, on the 7th day of August, 1908, being within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Northern District of California, wherein John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, are plaintiffs in error, and you are defendant in error to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable William C. Van Fleet, United States District Judge for the Northern District of California, this 9th day of July, A. D. 1908.

W. C. VAN FLEET,
*United States District Judge.*

Service of within citation, by copy, admitted this 9th day of July, A. D. 1908.

ROBT. T. DEVLIN,
*Attorney for Defendant in Error.*

(Endorsed:) No. 13519. In the Circuit Court of the United States for the Ninth Circuit, Northern District of California. John McMullen et al., plaintiffs in error, vs. United States of America, defendant in error. Citation. Filed July 9th, 1908. Southard Hoffman, clerk. By J. A. Schaertzer, deputy clerk.

128 (Endorsed:) No. 1642. United States Circuit Court of Appeals for the Ninth Circuit. John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, plaintiff in error, vs. The United States of America, defendant in error. Transcript of record. Upon writ of error to the United States Circuit Court for the Northern District of California.

Filed September 4, 1908.

F. D. MONCKTON, *Clerk.*

129 United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

*Certificate of clerk U. S. Circuit Court of Appeals to printed transcript of record.*

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing one hundred and twenty-eight (128) pages, numbered from one (1) to one hundred and twenty-eight (128), both inclusive, to be a true copy of the printed transcript of record upon writ of error to the United States Circuit Court for the Northern District of Califonia in the above-entitled case as the original, and copies thereof were printed under my supervision pursuant to the provisions of rule 23 of the rules of practice of the said the United States Circuit Court of Appeals for the Ninth Circuit, and as the said original remains of record in my office.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this 9th day of July, A. D. 1909.

[SEAL.] F. D. MONCKTON, *Clerk.*
By MEREDITH SAWYER, *Deputy Clerk.*

130 United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

Proceedings had in the United States Circuit Court of Appeals for the Ninth Circuit.

(Addenda.)

131 At a stated term, to wit, the October term, A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Friday, the sixth day of November, in the year of our Lord, one thousand nine hundred and eight.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

JOHN McMULLEN ET AL., PLAINTIFFS IN ERROR,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

*Order of submission.*

Ordered, above-entitled cause argued by Mr. John B. Selby, counsel for the plaintiffs in error, and Mr. Assistant United States Attorney George Clark, counsel for the defendant in eror, and submitted to the court for consideration and decision, further brief to be filed 10 x 10.

132 In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

*Opinion of U. S. Circuit Court of Appeals.*

Burke Corbet, J. R. Selby, and Edward J. Lynch for the plaintiffs in error; Robert T. Devlin, United States attorney, and George Clark, assistant United States attorney, for the defendant in error.

Before Gilbert, Ross, and Morrow, circuit judges.

On or about September 14, 1897, the Navy Department of the United States advertised for proposals for dredging at the United States Naval Station at Port Royal, South Carolina. The New York Dredging Company sent a bid, which was accepted, and on October 25, 1897, a contract, in writing, was executed by that company as principal, and John McMullen and R. Percy Wright as sureties, parties of the first part, and the United States of America,
party of the second part. To the contract was annexed a
133 bond in the sum of $30,000, with the New York Dredging Company as principal and John McMullen and R. Percy Wright as sureties, conditioned for the faithful performance of the contract. The plans and specifications on which the bids had been made were attached to the contract and made a part of it. The portions of the plans and specifications and bond necessary to be considered on the writ of error are as follows:

"16. TIME OF COMMENCEMENT OF WORK.—The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption; the entire work to be completed in sixteen calendar months from date of contract.

"17. PROGRESS OF WORK.—If at the close of any working month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the Government may refer the matter to a board of three officers, and if

recommended by them, and the interests of the Government so require, annul the contract and complete the work in such manner as it deems best, at the expense of the contractor and his sureties.

"18. UNAVOIDABLE DELAYS.—When an unavoidable accident, storm, or other act of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence in detail, and state in what way and to what extent it will delay the fulfillment of his contract, in order that the necessary investigation may be made, and the matter put on record. And it is clearly to be understood that unless it be done whenever such thing occurs, no subsequent
134 application for an extension of time for the completion of the contract on account of such occurrence will be recommended.

"19. AVOIDABLE DELAYS.—Should the progress of the work be delayed by anything but unforseen and unavoidable accidents, storms, or other acts of Providence, or by the action of the Government, no application by the contractor for an extension of time for the completion of his contract will be recommended by the officer in charge for favorable consideration, except on condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and by granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt.

"20. AUTHORITY FOR EXTENSION OF TIME.—No extension of time for the completion of the work will be made except upon the authority of the Secretary of the Navy."

The condition of the bond was as follows:

"The condition of the above bond is such, that if the said above-bounden New York Dredging Company, their heirs, executors, or assigns, shall well and truly, and in a satisfactory manner, fulfill and perform the stipulations of the contract hereto annexed, entered into with the Chief of the Bureau of Yards and Docks, acting under
135 the directions of the Secretary of the Navy, for and in behalf of the United States, and shall conform in all respects to said contract, and to the plans and specifications attached thereto and forming a part thereof, and to the satisfaction of the said Chief of the Bureau of Yards and Docks, and shall promptly make payments to all persons supplying him or them labor and materials in the prosecution of the work provided for in the aforesaid contract, then this obligation to be void and of no effect; otherwise to remain in full force and virtue."

The New York Dredging Company began work under its contract, and encountered difficulty through striking rock. The work was also delayed by storms and accidents to machinery. Early in 1899,

and before February 15, it was ascertained by the Government that only about one-third of the dredging contracted for had been done. Two weeks then remained of the sixteen months in which the contract was to be completed. In response to a request from the dredging company, the time for the completion of the contract was extended to December 30, 1899. The dredging company failed to complete the contract within the time so extended. On March 25, 1901, the Chief of the Bureau of the Department of the Navy addressed a letter to the dredging company as principal, and to McMullen and Wright as sureties, stating that because of their failure to perform the contract of October 25, 1897, "the party of the second part, exercising the option reserved to them, declare said contract null and void without prejudice to their right to recover for default therein or violation thereof," and notified them that an advertisement had been pre-
136 pared and issued inviting proposals for the completion of the work under said contract, and that the same would be completed at the expense of the dredging company and the sureties. On December 5, 1903, the United States brought this action against the dredging company and the sureties to recover the sum of $25,588.02, alleged to be the difference between "what the defendant New York Dredging Company agreed to perform the work of dredging for and what it actually cost these plaintiffs to complete the work," and for the further sum of $31,750 as liquidated damages. The answer of the sureties set up the defense, among others, that the contract entered into on October 25, 1897, was, by the terms thereof, to have been fulfilled by the dredging company and the work mentioned therein was to have been completed between February 23, 1897, and December 30, 1899; that the time was extended, and the condition of the contract was in that regard changed by the plaintiffs without the consent of said sureties. Upon the pleadings and an agreed statement of the facts judgment was rendered for the defendant in error.

Gilbert, circuit judge, after stating the case, delivered the opinion of the court.

The time for the completion of the contract, which was originally sixteen months from the date of the contract, was, without the consent of the sureties, extended for a further period of one year. We may premise the discussion of the question whether the sureties were thereby released from their obligation by adverting to some of the well-settled principles applicable to the obligation of a surety for the performance of his principal's contract. (1) The contract
137 of a surety is to be construed as any other contract, that is to say, according to the intent of the parties, and the rules for its construction are not to be confused with the rule that sureties are favorites of the law and have the right to stand upon the strict terms of their obligations. (Brandt on Suretyship and Guaranty (2nd ed.), sections 92 and 94; Lee v. Dick, 10 Pet., 480, 493.) (2) It being determined what is the meaning of the contract, the sureties are entitled to stand upon the very terms of their undertaking. Said Justice Story: "Nothing can be clearer, both upon principle and

authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and variation is made, it is fatal." (Miller v. Stewart, 9 Wheaton, 680, 701.) Of similar import are Smith et al. v. United States (2 Wall., 219), Reese v. United States (9 Wall., 13), United States v. Freel (186 U. S., 309), and Guaranty Co. v Pressed Brick Co. (191 U. S., 416). (3.) If, in a contract for the performance of work or the construction of a building or other improvement, it is provided that in the course of the work one of the parties shall have the right to make certain specified changes therein, the sureties for the contractor are deemed to assent in advance to the making of such alterations, and if they are made, although they may materially vary the contract, the sureties are not released thereby. (Wehr et al.
138 v. Germ. Evan. St. Matthews Con. Balto., 47 Md., 177; Hayden v. Cook, 34 Neb., 670; Village of Chester v. Leonard et al., 68 Conn., 495; Peoples Lumber Co. v. Gillard, 136 Col., 55; United States v. Freel, 92 Fed., 299; De Mattos v. Jordan, 15 Wash., 378; Northern Light Lodge v. Kennedy, 73 N. W., 524; American Surety Co. v. San Antonio Loan & Trust Co., 98 S. W., 387, 403.)

It is not disputed that the extension of time given the contractor in the present case was a variation of the contract sufficient in itself to discharge sureties, but the defendant in error contends that the contract provides for extensions of time and that therefore the sureties must be deemed to have assented thereto, and that the case comes within the doctrine of the decisions last above cited. It is true that the contract refers in terms to the subject of extension of time. It provides, first, that in case of unavoidable accident or storm which is likely to delay the progress of the work, the contractor shall forthwith notify in writing the officer in charge, stating in what way and to what extent the fulfillment of the contract may be delayed, so that timely investigation may be made, and that unless that be done, no subsequent application for extension of time on account of such occurrence will be recommended. It provides further that if the progress of the work should be delayed by anything but unforeseen and unavoidable accidents or storms, or by the action of the Government, no application by the contractor for an extension of time will be recommended for favorable consideration except on condition that the contractor make good any deterioration caused by such delay, etc., and that no extension of time for the completion of the work
139 can be made except upon the authority of the Secretary of the Navy. In none of these provisions is there a promise on the part of the United States that there shall be an extension of time. In none of them, under any exigency that may arise, is the contractor given any right to extension of time. The whole purport of these

provisions is to let the contractor know what, if any, excuses for delay will be considered by the officers of the Government in case of an application for extension of time, and to specify the officer of the Government in whom alone is vested the power to grant it. Such a contract does not provide for an extension of time. It gives no right of any kind to either of the contracting parties. To say that the contractor may apply for an extension of time is to confer no right. That right, it is needless to say, always exists in the absence of such a provision. The mere suggestion in the contract that one of the parties thereto may, if it sees fit, ask for an extension of time, and that the other party may, if it sees fit, grant it, interjects nothing of a contractual nature. By virtue thereof the sureties who undertake to become responsible for the performance of the contract can not be said to assent to extension of time. Sureties to all contracts must be presumed to know that the contracting parties have, as between themselves, the power to make such alterations therein as they may subsequently agree upon. Unless the right to alter the same is expressly reserved in the contract itself, the obligation of the sureties is to answer for the default of their principal upon the precise contract made, and not upon one which may thereafter be made without their assent. Even an express provision in such a contract
140 that in the event of the occurrence of certain causes of delay "additional time may in writing be allowed" the contractor, does not mean that it shall be allowed. (United States v. Gleason, 175 U. S., 588.)

The decisions cited and relied upon by the defendant in error are all cases in which the power to make the alterations was expressly reserved and in which it was stipulated that the contract should not thereby be invalidated. Thus, in Wehr. et al. v. Germ. Evan. St. Matthews Con. Balto., the court said: "But if by the terms of the original contract additions to or alterations in the work are provided for, or left to the judgment and discretion of the other contracting party, either without limit or within certain limits, then the variation, if within the limits prescribed, is allowed by the contract itself, and the surety can not complain of the variation which he has agreed to by the original contract." In Hayden v. Cook, in a building contract, it was provided that the owner, at any time during the progress of the work, should have the right to make any alterations, changes, or additions to the building, and that the same should not invalidate the contract. It was held that the changes and additions disclosed by the evidence were provided for in the contract, and that the making of the same did not discharge or release the surety. In Village of Chester et al. the original contract provided that the engineer of the village could make such changes in the forms, dimensions, and alignment of the work as might, in his opinion and that of the board of water commissioners, be necessary for its proper fulfillment. The court said: "Sureties
141 for the performance of a contract so framed must be presumed to contemplate the making of such changes, and as the

defendants did not stipulate for any right to participate in determining whether they should be made, there was no occasion to notify any one but the principal contractor of the fact that they had been ordered." In Peoples' Lumber Company v. Gillard it was held that where the contract to which the bond was appended provided for certain changes by the board of trustees the sureties on the bond must be presumed to have known of such provision and to have agreed that they would be bound in case changes were made in the contract. The other cases cited are of like effect.

The judgment is reversed, and the cause is remanded to the Circuit Court with instructions to enter judgment for the defendants in the action upon the pleadings and the agreed statement of facts.

(Endorsed: Opinion. Filed Feb. 1. 1909. F. E. Monckton, clerk.

142 United States Circuit Court of Appeals for the Ninth Circuit.

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| JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR with the will annexed of the estate of R. Percy Wright, deceased, | No. 1642. |
| *vs.* | |
| THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. | |

*Judgment U. S. Circuit Court of Appeals.*

In error to the Circuit Court of the United States for the Northern District of California.

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Northern District of California, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Circuit Court in this cause be, and the same is hereby, reversed, and the cause is remanded to the said Circuit Court with instructions to enter judgment for the defendants in the action upon the pleadings and the agreed statement of facts.

(Endorsed:) Judgment. Filed and entered February 1, 1909. F. D. Monckton, clerk.

143 At a stated term, to wit, the October term, A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Tuesday, the twenty-third day of February, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

JOHN McMULLEN ET AL., PLAINTIFFS IN ERROR,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

*Order denying petition for a rehearing.*

It is ordered that the petition for a rehearing heretofore filed in the above-entitled cause be, and hereby is, denied.

144 At a stated term, to wit, the October term, A. D. 1908, of the United States Circuit Court of Appeals for the Ninth Circuit, held at the court room, in the city and county of San Francisco, on Monday, the first day of March, in the year of our Lord one thousand nine hundred and nine.

Present: The Honorable William B. Gilbert, circuit judge; Honorable Erskine M. Ross, circuit judge; Honorable William W. Morrow, circuit judge.

JOHN McMULLEN ET AL., PLAINTIFFS IN ERROR,
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR. } No. 1642.

*Order staying issuance of mandate.*

Upon motion of Mr. Assistant United States Attorney George Clark, counsel for the defendant in error, ordered, issuance of the mandate of this court to the court below in the above-entitled cause stayed for the period of sixty (60) days.

145 No. 1642.

In the United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR, with the will annexed of the estate of R. Percy Wright, deceased, plaintiffs in error.
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

*Assignment of errors.*

The defendant in error above named, to wit, the United States of America, having obtained from the Supreme Court of the United States a writ of error directed to the honorable judges of the above entitled court, comes now and says that in the above entitled matter there is manifest error, in that the United States Circuit Court of Appeals for the Ninth Circuit erred in reversing the judgment of the Circuit Court of the United States, Ninth Circuit, Northern

District of California, and in remanding the above cause to the said Circuit Court with instructions to enter judgment for the defendants in the action upon the pleadings and the agreed statement of facts therein in the following particulars, to wit:

1. The said United States Circuit Court of Appeals erred in determining and deciding that the extension of time for the
146 performance of the contract by the New York Dredging Company without the consent obtained of John McMullen and R. Percy Wright did release the said John McMullen and R. Percy Wright from the bond securing the performance of the said contract and all liability incurred by the said John McMullen and R. Percy Wright by said bond and contract.

2. The said United States Circuit Court of Appeals erred in determining and deciding that the said John McMullen and the said R. Percy Wright, who executed the said contract, together with the said New York Dredging Company, and who executed the said bond as sureties had not given their consent to the said extension of time prior to the making of the said extension.

3. The said United States Circuit Court of Appeals erred in determining and deciding that the said New York Dredging Company had not the right, independent of the consent or permission of the said McMullen and the said R. Percy Wright, to apply for and obtain from the United States of America, with whom said contract was made, the extension of time for the performance of said contract, which was in fact granted.

4. The said United States Circuit Court of Appeals erred in determining and deciding that paragraph 18 and paragraph 20 of the specifications of the said contract of the New York Dredging Company did not provide for extensions of time, made necessary by unavoidable delays, which extensions might be granted without voiding the contract of the so-called sureties McMullen and Wright, unless the consent of the said McMullen and Wright to the extension was first obtained.

147 5. The said United States Circuit Court of Appeals erred in determining and deciding that paragraphs 19 and 20 of the said specifications did not provide for extensions of time made necessary or proper by unavoidable delays in the progress of the execution of the contract, which extensions of time might be granted to the contractor at the option of the United States of America, without there having been obtained consent thereto on the part of the said McMullen and the said Wright.

6. The said United States Circuit Court of Appeals erred in determining and deciding that paragraph 20 of the said specifications did not confer upon the Secretary of the Navy of the United States of America, acting as the representative of the said United States of America, exclusive and complete power to grant extensions of time in the execution of the said contract, without obtaining the consent of the said McMullen or the said Wright.

7. The said Circuit Court of Appeals erred in determining and deciding that the said paragraphs 18, 19, and 20 of the said specifications did not determine in advance of the occurrence the necessity for or propriety of an extension of time for the execution of the said contract, the procedure, which when followed by the contractor would confer upon him the right to have his application for an extension of time received, considered, and treated in good faith and finally granted, if proper, and if determined to be proper by the Secretary of the Navy of the United States, exercising an honest and intelligent discretion in determining the propriety or necessity for any such extension.

148 8. The said United States Circuit Court of Appeals erred in determining and deciding that the Secretary of the Navy of the United States was not, by express agreement of the said New York Dredging Company and of the said McMullen and Wright selected and appointed the arbiter to determine, in case of any application for an extension of time, the propriety of or necessity for any such extension.

9. The said United States Circuit Court of Appeals erred in determining and deciding that so long as the said Secretary of the Navy acted in good faith, honestly and intelligently, he had not the power to determine finally and conclusively as against the said New York Dredging Company, the said McMullen and the said Wright, the propriety of or necessity for an extension or the length of any extension of time that might be granted.

10. The said United States Circuit Court of Appeals erred in determining and deciding that in the event an application for an extension of time was made in conformity with paragraphs 18 or 19 of the said specifications, the said United States of America had not the option to grant the extension of time applied for.

11. The said Circuit Court of Appeals erred in determining and deciding that the said extension of time which was in fact granted to the said New York Dredging Company in the above-named case, and as shown by the stipulation of facts therein was not granted in accordance with paragraphs 18, 19, and 20 of the said specifications of the said contract of the said New York Dredging Company.

149 The New York Dredging Company wholly failed to carry out its contract with due diligence, or otherwise, within the time originally granted it, or within the time for completing the work as extended. The United States exercising the right reserved to it under its contract thereupon annulled the contract with the New York Dredging Company. The work provided for not having been completed by the New York Dredging Company, the United States proceeded to relet the work at a rate which was higher than that provided for under the contract with the New York Dredging Company. The original contract with the New York Dredging Company provided that in the event of such an annulment, the unfinished work might be completed at the expense of the parties to the original contract, and at the expense of the sureties.

The work was completed by P. Sanford Ross. The cost of completion exceeded what the work would have cost had the work been performed by the New York Dredging Company. The Circuit Court awarded judgment to the United States for the increased cost of completion.

12. The said United States Circuit Court of Appeals erred in determining and deciding that the said John McMullen and the said R. Percy Wright were not responsible and liable to the United States under their said contract and bond, for the said increased cost of completing the work unfinished under the contract of the New York Dredging Company, and which work the said New York Dredging Company and the said McMullen and the said Wright had
150 agreed should be completed by the said New York Dredging Company under the terms of the contract with that company, executed by that company and by the said John McMullen and by the said R. Percy Wright. The said Circuit Court of Appeals erred in determining and deciding that the contract with the New York Dredging Company was not properly annulled under specification 17 of the said contract with the said company, and that the said John McMullen and the said R. Percy Wright were not responsible to nor liable to the United States on account of the expense of completing the work left unfinished by the New York Dredging Company.

13. The said United States Circuit Court of Appeals erred in determining and deciding that the said John McMullen and the said R. Percy Wright were not bound as principals, notwithstanding that they signed the original contract with the New York Dredging Company and agreed that the same should be fully performed as appears from the said contract attached to and made a part of the complaint.

14. The said United States Circuit Court of Appeals erred in determining and deciding that the extension of time granted in this case was in any way material or did affect in any way or increase in any way the responsibility and liability of the said McMullen and the said Wright under their said contract and under their said bond. The court erred in determining and deciding that the said extension was in any way material.

15. The said United States Circuit Court of Appeals erred in determining and deciding that the said McMullen and the said Wright had the right to object to the said extension of time,
151 as being inconsistent with their contract and inconsistent with their said bond, without showing that such extension of time in some way affected the responsbility or liability of the said McMullen and the said Wright under their contract and under their said bond.

16. The court erred in determining and deciding that the said McMullen and the said Wright, after having signed the said contract were not themselves responsible for the full performance thereof.

17. The said United States Circuit Court of Appeals erred in determining and deciding that the said McMullen and the said Wright were not insurers, insuring the performance of the said contract.

A surety upon a bond for the faithful performance of a contract who has received valuable and adequate consideration for his undertaking, cannot complain bevause of a variation in the contract of his principal, without showing material injury resulting from such change, or an increase of risk, or a practical substitution of a new contract. In this case John McMullen and R. Percy Wright executed the original contract with the New York Dredging Company. The contract is in writing, and they stipulated for its full performance. In addition they executed a bond for the faithful performance of this contract.

18. The said United States Circuit Court of Appeals erred in determining and deciding under the circumstances that the said John McMullen and the said R. Percy Wright were not in effect sureties who had received valuable and adequate consideration
152 for their said undertakings. There was no evidence to show that their undertakings were not based upon adequate and valuable consideration.

Wherefore the United States of America prays that the judgment of the said United States Circuit Court of Appeals be reversed.

Dated June 14th, 1909.

GEORGE W. WICKERSHAM,
*Attorney-General for the United States.*

ROBT. T. DEVLIN,
*United States Attorney for the Northern District of California.*

GEORGE CLARK,
*Asst. United States Attorney for the Northern District of California.*

*Attorneys for the defendant in error above named, plaintiff in error in the Supreme Court.*

(Endorsed:) Assignment of errors. Filed June 17, 1909. F. D. Monckton, clerk.

153 United States Circuit Court of Appeals for the Ninth Circuit.

JOHN McMULLEN AND JOSEPH A. STULZ, AS ADMINISTRATOR with the will annexed of the estate of R. Percy Wright, deceased, Plaintiff in Error.
*vs.*
THE UNITED STATES OF AMERICA, DEFENDANT IN Error.
} No. 1642.

*Certificate of Clerk U. S. Circuit Court of Appeals to proceedings and transcript of record upon return to writ of error.*

I, Frank D. Monckton, as clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing twenty-four (24) pages, numbered from one (1) to twenty-four (24),

inclusive, to be a true copy of the assignment of errors and of all proceedings had in the above-entitled case in the said the United States Circuit Court of Appeals for the Ninth Circuit, including the opinion filed therein, as the same remain of record in my office, and that the same in connection with the preceding certified copy of the printed transcript of record constitute a true copy of the complete record in the above-entitled case and the transcript of record upon return to the annexed writ of error therein from the Supreme Court of the United States.

Attest my hand and the seal of the said the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, in the State of California, this ninth day of July, A. D. 1909.

[SEAL.] F. D. MONCKTON, *Clerk*,
By MEREDITH SAWYER, *Deputy Clerk*.

154 UNITED STATES OF AMERICA, *ss:*

*The President of the United States to the honorable the judges of the United States Circuit Court of Appeals for the Ninth Circuit, greeting:*

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you, between John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, and the United States of America, defendant in error, a manifest error hath happened, to the great damage of the said defendant in error, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 60 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of May, in the year of our Lord one thousand nine hundred and nine.

[SEAL.] JAMES H. MCKENNEY,
*Clerk of the Supreme Court of the United States.*

Allowed by
JOSEPH MCKENNA,
*Associate Justice of the Supreme Court of the United States.*

155 *Return to writ of error.*

The answer of the judges of the United States Circuit Court of Appeals for the Ninth Circuit.

As within we are commanded, we certify, under the seal of our said Circuit Court of Appeals, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the Supreme Court of the United States, within mentioned, at the day and place within contained.

We further certify that a copy of this writ has been duly lodged for the within-named defendant in error.

UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT.
By F. D. MONCKTON, *Clerk.*

[SEAL.]

Due service and receipt of copy of the within writ of error admitted this 14th day of June, 1909.

BURKE CORBET AND J. R. SELBY.
E. J. LYNCH,
*Attorney for Plaintiffs in Error.*

(Indorsed:) Docketed No. 1642. United States Circuit Court of Appeals for the Ninth Circuit. John McMullen et al. vs. United States of America. Original writ of error. Filed Jun. 17, 1909. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

156 UNITED STATES OF AMERICA, *ss:*

*To John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased, greeting:*

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 60 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein the United States of America is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Joseph McKenna, associate justice of the Supreme Court of the United States, this 28th day of May, in the year of our Lord one thousand nine hundred and nine.

JOSEPH McKENNA,
*Associate Justice of the Supreme Court of the United States.*

157 On this 17th day of June, in the year of our Lord one thousand nine hundred and nine, personally appeared F. Wythe before me, the subscriber, and makes oath that he is a white male citizen of the United States over the age of 21 years, and further that he delivered a true copy of the within citation to Messrs. Burke Corbet and J. R. Selby, attorneys for the within named John McMullen, personally on June 14th, 1909, and a true copy of the within citation to E. J. Lynch, attorney for the within named Joseph Stulz, as administrator of the estate of R. Percy Wright, deceased, personally on the 17th day of June, 1909.

F. WYTHE.

Sworn to and subscribed the 17th day of June, A. D. 1909.

[SEAL.] F. D. MONCKTON,

*Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.*

(Indorsed:) Docketed No. 1642. United States Circuit Court of Appeals for the Ninth Circuit. John McMullen et al. vs. United States of America. Original citation on writ of error. Filed June 17, 1909. F. D. Monckton, clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

158 (Indorsement on cover:) File No., 21764. U. S. Circuit Court Appeals, 9th Circuit. Term No., 281. The United States, plaintiff in error, vs. John McMullen and Joseph A. Stulz, as administrator with the will annexed of the estate of R. Percy Wright, deceased. Filed July 20th, 1909. File No., 21764.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

THE UNITED STATES, PLAINTIFF IN Error.
*v.*
JOHN MCMULLEN AND JOSEPH A. STULZ as Administrator with the Will Annexed of the Estate of R. Percy Wright, Deceased. | No. 100.

*IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

This is a writ of error to review a judgment of the Circuit Court of Appeals for the Ninth Circuit, reversing a judgment rendered by the Circuit Court of the United States for the Northern District of California.

The suit was by the United States to recover damages for the breach of a contract between the United States and the New York Dredging Company, John McMullen and R. Percy Wright being sureties for the performance of the contract by the Dredging Company. (R., 1–4.)

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Pending the litigation Wright died, and Joseph A. Stulz, his administrator, was substituted as defendant.

The case was tried in the Circuit Court upon the pleadings and a stipulation of facts, and judgment was there rendered in favor of the United States against all the defendants. (R., 34.)

The sureties, and they alone, sued out a writ of error from the Circuit Court of Appeals, which reversed the judgment of the Circuit Court, and now the United States brings the case here.

The contract was for dredging the channel of the Beaufort River at Port Royal, South Carolina; was entered into October 25, 1897; and was to be completed within sixteen months. (R., 2, 6.) The time was extended for doing the work, but before the work was half completed it was abandoned altogether by the company.

The work was then completed under contract with a third party, but at an increased cost; and for this increased cost the Circuit Court rendered its judgment. (R., 3, 34.)

The sureties deny liability on their part, on the grounds, viz:

(1) The time for completing the work was extended without their consent.

(2) The mode of performing the contract was changed without their consent.

(3) The United States annulled the contract without reserving the right to complete the work and charge the increased cost to the contract.

(4) The United States has failed to show any amount of damages.

(5) The contract was not enforceable against the Dredging Company for uncertainty and want of mutuality.

The Court of Appeals passed only upon the first proposition, and, holding that to be established, reversed the case. On this hearing, however, the United States must meet all the defenses urged, and this will be done in the order stated above, which is that followed in the brief of defendants in error.

### ASSIGNMENTS OF ERROR.

The record contains elaborate assignments of error (pp. 75 to 79), which it would serve no purpose to repeat here. They do but challenge in varying forms the ruling of the Court of Appeals discharging the sureties because of the extension of time granted for the completion of the contract.

The case is argued at great length by defendants in error, but the discussion is taken up in greater part with legal propositions which we have no occasion to dispute, and, indeed, are elementary and beyond dispute.

What is here to be determined is rather whether the propositions stated by defendants in error, and relied upon as defeating the Government's claim for recovery against the sureties, find any support in the facts of the case.

ARGUMENT.

## I.

### As to the extension of time.

By the original terms of the contract the work must be completed by February 25, 1899. The Dredging Company, on January 23, 1899, asked for an extension until December 30, 1900. Time was extended until December 30, 1899. (R., 36, 37.)

But the specifications, which are part of the contract, provide (R., 10, 11):

> 16. TIME OF COMMENCEMENT OF WORK.—The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption, the entire work to be completed in sixteen calendar months from date of contract.
>
> 17. PROGRESS OF WORK.—If at the close of any working month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the Government may refer the matter to a board of three officers, and, if recommended by them and the interests of the Government so require, annul the contract and complete the work in such manner as it deems best, at the expense of the contractor and his sureties.
>
> 18. UNAVOIDABLE DELAYS.—When an unavoidable accident, storm, or other act of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence, in detail,

and state in what way and to what extent it will delay the fulfillment of his contract, in order that the necessary investigation may be made and the matter put on record. And it is clearly to be understood that unless it be done whenever such thing occurs, no subsequent application for an extension of time for the completion of the contract on account of such occurrence will be recommended.

19. AVOIDABLE DELAYS.—Should the progress of the work be delayed by anything but unforeseen and unavoidable accidents, storms, or other acts of Providence, or by the action of the Government, no application by the contractor for an extension of time for the completion of his contract will be recommended by the officer in charge for favorable consideration, except on the condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract with the United States according to its terms; and by granting the extension of time asked for there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt.

20. AUTHORITY FOR EXTENSION OF TIME.—No extension of time for the completion of the work will be made except upon the authority of the Secretary of the Navy.

> 21. DAMAGES FOR DELAY.—In case the completion of the work shall be delayed beyond the period fixed upon for the completion of the contract; deductions of $50 per day during such delay may, in the discretion of the Secretary of the Navy, be made from the contract price of said work as liquidated damages.

Here, then, is provision for extension of time assented to by the sureties from the beginning and with actual knowledge, for they signed the contract itself as well as a bond.

And this provision is for the benefit of the contractor and sureties. Under sections 16 and 21, without more, the company was bound to push the work to completion and suffer a loss of $50 per day for every day of delay beyond the appointed time.

Sections 18, 19, and 20 relaxed this rigor of the contract and provided for an extension of time which would relieve against the stipulation for damages on account of delay.

The manifest purpose and effect of these three sections is to submit to the Secretary of the Navy for determination whether or not fair and equitable dealing calls for an extension of time, either because of unavoidable or avoidable causes; and his grant or denial of an extension in the exercise of a discretion honestly exercised is within the contemplation of the contract.

The company, on January 23, 1899, asked for an extension of time to December 30, 1900, and gave as a reason "delays caused by storms and accidents

approximating 30 to 40 days," and further said that "the progress of the work thus far indicates that we will require a considerable extension of time on this contract owing to unforeseen hardness of the material and unforeseen difficulties in the execution of the work." (R., 36, 37.)

Acting on this request, and the recommendation of the Government engineer, the time was extended by authority of the Secretary of the Navy to the close of the year. (R., 37, 40.)

This was clearly in accordance with the provisions of the contract.

It is said that so far as avoidable delays are concerned, the specification (19) provides that the application for extension will not be recommended by the officer in charge, "except on condition that the contractor make good any deterioration caused by such delay and bear the additional cost of supervision and inspection by the Government, and other expenses caused by the failure of the contractor to fulfill his contract," etc. (R., 11), and that as this was not made a condition precedent to the extension, the contract was varied and the sureties released.

Granting that delay occasioned by finding a rock instead of a mud bottom was due to an avoidable cause, there was nothing in the nature of a change in the contract, for it does not appear that the United States waived any right whatever. What deterioration or additional cost of supervision and inspection would result to the Government as a consequence of the extension was not then known, and there was

no requirement that it should be then computed or estimated. The United States, under the nineteenth specification, must first incur the expenditure, and, this having been done, "there shall be reimbursed to the United States by the contractor the amount of such additional charges, to be deducted from any money that may be or may become due him from the United States under this contract, the difference only to be paid him upon his receipt." The presumption is that the extension was made pursuant to the contract, and the United States will not be held to have waived any right in the absence of any evidence tending to show such a purpose.

But, granting that the Government did not intend to charge the contractor with the increased cost of supervision and inspection occasioned by the extension, how did that change the contract, either as to the contractor or the sureties? That would be an absolute gift or gratuity. The extension itself was provided for by the contract, so the mere grant of that did not change the terms of the contract. The nature of the work to be done was not changed, nor the manner in which it was to be done. The terms of payment remained the same. The sole difference would be that at the end of the work the Government would not deduct from the payment to be made to the contractor a sum which it was entitled to deduct. It is not a case of making payment to the contractor on account of the contract in advance of the prescribed time for payment; it is not paying him in the course of the work more than the percentage stipu-

lated to be paid before its final completion; but it is simply giving him something which the Government was not bound to give, and might, if it chose, withhold altogether. Under the contract the company was to furnish all the labor and appliances necessary to do the dredging, and it had the right to get these where it chose. The Government could not insist that the company buy or hire any particular dredges or scows, or employ any particular persons to do the work. If, however, a storm should sweep away a scow and the Government had one at hand and gave the use of that to the contractor until he could get another, or, if you please, until he completed the work, that would not change the contract, although it might be said the Government was furnishing the appliances in part. Or, if in some emergency a Government engineer should volunteer his services in aid of some portion of the work, it would not vary the contract, although it might be said that the contractor did not provide all the labor. We venture to say that no case can be found in which an absolute gift to the principal is held to discharge the surety. If the payee of a note, as a gift to the principal, indorsed a credit upon it, that would not change the contract as to a surety. The right to do this is an inherent one, and there is nothing in the relation of suretyship which requires protection against its exercise.

In *United States* v. *Hodge*, 6 How. 279, Ker, postmaster at New Orleans, was defaulter for a large amount. The resulting indebtedness was of course

one immediately due. The Government got from Ker a mortgage on property, real and personal, to secure the payment of a sum not exceeding $65,000, or such sum as might be found due on a settlement, from and after six months from the date of the mortgage. In a suit on Ker's official bond it was insisted by his sureties that they were released by this mortgage, because it gave time to Ker for the payment of the indebtedness. The court said (p. 283):

> If the remedy on an instrument is suspended, for a valuable consideration, the indorser or security is released, because his right to discharge the obligation and be subrogated to the rights of the holder of the paper is also suspended. But a contract to give time is void, and does not release the security, unless it be founded upon a valuable consideration. It must be a contract which a court of law or equity can enforce. Now there is no contract in the mortgage which suspends the right of action on the official bond. Consequently, no injury is done to the sureties on that bond. They are left free to act for their own interests, as they could have acted before the mortgage. *The principle on which sureties are released is not a mere shadow without substance. It is founded upon a restriction of the rights of the sureties, by which they are supposed to be injured.* But by no possibility can they be injured in the case under consideration. On the contrary, it is clear that the morgtage may operate beneficially to them, if they shall pay the amount of their bond. And the Circuit Court should have instructed the jury to this effect.

In *Cambridge Savings Bank* v. *Hyde*, 131 Mass. 77, the suit was upon a promissory note which stipulated for interest at seven and a half per cent per annum. The payee, by agreement with the principal debtor, indorsed upon the note "Rate of interest to be 6½ per cent from Oct. 10, 1876." The sureties pleaded this in discharge of their liability. The court said (pp. 79, 80):

> In the case at bar, the new agreement was, that, after a day named, the interest on the principal sum lent by the plaintiff should be at the rate of six and a half instead of seven and a half per cent. It was clearly not the intention of the parties to discharge the note and substitute a new contract in its place. The agreement presupposes that the note is to remain in force as a promise to pay the principal debt. The parties did not intend to release the principal debtor or the sureties from their obligation to pay the note, but only to remit a portion of the interest payable under it for the use of the money. We know of no rule of law which requires us to defeat the intention of the parties by holding that this operated to discharge the original contract in whole. It is also clear that the change in the original contract, by reducing the rate of interest, could not be prejudicial to the sureties. It is to be borne in mind that there was no contract by the plaintiff giving time to the principal debtor, and no contract by the debtor that the amount of the note should remain on interest at the new rate for any

> time The plaintiff could at any time have sued on the note, and the sureties could at any time have paid the note and have had a right to sue their principal at once. The agreement was merely a stipulation to remit a part of the sum which the plaintiff might claim under the note. It did not tie the hands of the creditor, or alter unfavorably the condition of the surety. If there was any consideration for it, so that it had any validity, it could not operate to the injury of the sureties, any more than an indorsement of, or a receipt for, a part of the principal would. The change made in the terms of the note was necessarily beneficial to all parties bound by it. We are of opinion that the sureties were not discharged, even if they had no knowledge of the change; and that the ruling of the Superior Court to that effect was correct.

Here, as in the cases cited, there was no new agreement to which the surety was not a party; there was simply, if there was anything at all, giving something to the contractor which the Government had the right to withhold. The Government in granting the extension did not exact everything it might have done. But, Portia to the contrary notwithstanding, it does not invalidate the bond to take less than the stipulated pound of flesh.

The contention that any change in the contract "must be agreed to in writing by the parties to the contract before the same is begun," has nothing to rest upon. The provision of the contract cited, as

well as the specification, the twenty-second, has reference to a change in the character of the work and not at all to time. This is so obvious, from a mere reading of the contract and specification, that discussion is unnecessary.

It is further contended that there was here an alteration of the contract, because, it is said, the company could not under any circumstances demand and enforce an extension as a matter of right, and an extension granted as a matter of grace by the Government did not, therefore, inhere in the contract. So, the argument runs, an extension having been granted as of grace and not of right, there was a change in the contract. The fact remains, however, that the contract contemplates that an extension of time may be desired, and it also contemplates that an extension may be granted, and to all this the sureties assent in advance. But the contract goes further than this. It implies that an application for extension will be considered upon its merits by the Secretary of the Navy and be justly decided by him, so that the company would get an extension if it was entitled thereto, and this pursuant to the terms of the contract. In this respect the contract is like that under consideration in *United States* v. *Gleason*, 175 U. S. 588. There it was provided that if the contractor was prevented by violence of the elements, etc., from completing the work in time, "such additional time *may* in writing be allowed him * * * as, in the judgment of the party of the first part [the

Government engineer] or his successor, shall be just and reasonable." Speaking of this provision of the contract the court said (p. 604):

> * * * we interpret it to mean that, as between the United States and the contractors, the latter were to be relieved from their contract obligation to complete the work within the time limited, only if, in the judgment of the engineer in charge, their failure so to do was occasioned by freshets or other force of the elements, and by no fault of their own; and that, if and when, in his judgment, the failure to complete was, in point of fact, due to the extraneous causes, he was also to decide what additional time should be just and reasonable. In other words, the parties agreed that if the contractors should fail to complete their contract within the time stipulated, they should have the benefit of the judgment of the engineer as to whether such failure was the result of their own fault or of forces beyond their control, and, in the latter event, of his judgment as to what extension of time would be just and reasonable.

So here it was a part of the contract, and not a departure from it, that there should be an extension of the time of performance if the company desired it, and the Secretary of the Navy thought the reasons assigned justified the granting it.

If the contract authorized an extension of time, the surety assented to it in advance and is bound by it. This was ruled in *United States* v. *Freel*, 92 F. R. 299, s. c. C. C. A. 99 F. R. 237, s. c. 186 U. S. 309.

And also in *United States* v. *Stone, etc., Co.*, 177 F. R. 321, where, dealing with such a provision of a contract, the Court of Appeals for the Fifth Circuit said (p. 325):

> * * * The contract shows that the parties contemplated that the contracting company might, by causes beyond its control and by no fault of it, be prevented from commencing or completing the work at the time agreed upon, and provided that such additional time might be allowed it for the commencement or completion thereof as, in the judgment of the named officer of the government or of his successor, should be just and reasonable. Under this provision, which expressed in advance the consent of the surety, the first extension applied for was so far granted as to fix the time for beginning active operations under the contract at January 24, 1900.

II.

**Change in the mode of performance.**

The contract is for dredging in Beaufort River. The "spoil," that which is brought up by the dredge, must be deposited somewhere. As to the place of deposit the specifications provide:

> 6. DEPOSIT.—The Government proposes to increase the area of the station by purchasing adjoining lands; therefore a part of the material shall be deposited on and within the boundaries of the station as they now exist, or may be in the future, at points to be designated by the commandant. The quantity

required to be deposited on the station is about 49,000 cubic yards, but the Government reserves the right to increase or decrease this amount to any extent. Material deposited on station shall be leveled and graded. The contractor will be required to retain the material deposited upon the station within the areas prescribed by embankments or other means approved of by the engineer in charge of the work for the Government, all at his own expense. In no case shall any material be deposited where it will injuriously affect the channel in front or leading to the station. (R., 9.)

9. MEASUREMENTS.—The material removed will be measured in place in the cut, in the channel, the total amount removed and paid for to be determined by the final survey and measurement made upon the completion of the entire work, and no allowance will be made for any filling that may occur during the progress of the work, increasing the amount to be removed.

All materials deposited upon the naval station will be taken from such point or points in the channel as directed by the engineer in charge, to admit of separate measurement.

If any material is removed which the contractor shall claim to be properly classed as rock, the engineer in charge will determine the classification and amount.

No materials are to be deposited upon lands in the immediate vicinity of the station without the written authority of the bureau. (R., 9, 10.)

32. BIDS.—Bidders will make separate and distinct offers for each of the following items of work:

Item 1. A price per cubic yard for earth dredged and deposited on the station, leveled and graded.

Item 2. A price per cubic yard for rock dredged and deposited on the station, leveled and graded, if required.

Item 3. A price per cubic yard for earth dredged and not deposited on station.

Item 4. A price per cubic yard for rock dredged and not deposited on station. (R., 12, 13.)

The deposit under this must be either upon the station or in deep water, and evidently as the Government might determine. To the contractor it seemed to make no difference in the beginning, for his bid was the same for deposit on the station and for deposit elsewhere. The essential thing is that the Government could require deposit on the station or not, as it chose.

May 2, 1899, the company had suspended work, and it never resumed operations again, but none the less it wrote asking for permission to deposit in deep water, saying that they had already deposited 80,000 yards on the station. This was refused on May 12. (R., 37, 42.) The request was renewed on July 18 and again denied on the ground that the spoil was needed on the station. (R., 37, 47.) On December 6, 1899, the company repeated its request, and on Feb-

ruary 21, 1900, it was granted, the United States engineer saying (R., 50, 51):

* * * * *

> 2. In consideration of the fact that the contract with you estimated the amount to be placed on shore at 49,000 cubic yards, although it reserved the right to make this quantity more or less, and in further consideration of the fact that you have, up to the present time, dredged and placed on shore a quantity about 80 per cent in excess of this, the bureau has concluded, under all the circumstances, to have the remainder of the material under your contract disposed of by depositing it in the harbor or any place allowable under the regulations governing the deposit of material in that vicinity.
>
> 3. The bureau requests, therefore, that you will complete arrangements at once and go ahead with the work on this basis, informing the bureau promptly of the progress and completion of the arrangement.

This, and only this, is the basis for the sureties' claim that "the contract was changed by the action of the Government in agreeing that no materials should be deposited on shore."

## III.

### Failure of the Government, when annulling the contract, to reserve its rights.

As has already been stated, the time for performance of the contract was extended from February 25, 1899, to December 30, 1899. No work, however, was done

after April, 1899, although promises of resumption were made from time to time. On October 10, 1900, the company wrote asking for an extension of time until December 31, 1901, which was not given. (R., 52.) Meanwhile the company was being urged by the Government to proceed with the work, and the sureties were notified of the delinquency of their principal.

March 25, 1901, the Government brought the matter to an end by the following letter, which was sent to the contractor and each of the sureties, viz (R., 53):

> DEPARTMENT OF THE NAVY,
> BUREAU OF YARDS AND DOCKS,
> *Washington, D. C., March 25, 1901.*
>
> GENTLEMEN: It appearing that you have failed on your part to perform the contract between yourselves, as parties of the first part, and the United States, by E. C. Matthews (Chief of the Bureau of Yards and Docks), acting under the direction of the Secretary of the Navy, party of the second part, dated October 25, 1897, for dredging at the Naval Station, Port Royal, South Carolina, which dredging was to have been completed within sixteen calendar months from the date of said contract, the party of the second part, exercising the option reserved to them, declare said contract null and void, without prejudice to their right to recover for defaults therein or violation thereof.
>
> Please take notice that an advertisement will be prepared and issued inviting proposals to complete the work under the aforesaid con-

tract, and that said work will be completed at your expense.

Very respectfully,
(Signed)
MORDECAI T. ENDICOTT,
*Chief of Bureau.*

It is plain that the contract had not been kept, and that, after patient waiting upon promises that matured only in repetition, the Government recognized the inevitable and declared it broken and terminated, cancelled, annulled, or what you will, as to any further proceeding by the contractor under it. The rights and liabilities of the parties were fixed. The contract had been broken, and the contractor was liable for the breach. The Government was entitled to have the work completed at the contract price, and it was damaged in the measure in which the cost of completion now would exceed the price stipulated in the contract. The Government certainly never intended to waive any right, and a reading of the letter of March 25, 1901, not only shows no waiver of its rights, but more than a reservation of them—an express purpose to assert them.

## IV.

### As to proof of damages.

The Government secured completion of the work under a contract with P. Sanford Ross at an increased cost above the price of the contract with the New York Company amounting to $25,588.02 (R., 2, 3), and for this sum, with interest, the Circuit Court rendered judgment. (R., 34.)

As to the evidence to support such a judgment:

The letters of the company to the naval engineer all show that it was to the advantage of the contractor to deposit the remaining spoil in deep water rather than on the station. In the letter of July 18, 1899, it is said (R., 46):

> * * * *If the Government can see its way to grant us permission to deposit the material in deep water, we are prepared to go ahead and carry out the contract, although even by doing it in this manner will cost us more than we actually get for the work, but this is not nearly so difficult as to undertake to deposit the material on the island.*
>
> While under the contract and specifications for doing this work the Government had the option of requiring that all of the material be placed ashore, yet the actual amount required for at the time contract was let was 49,000 cubic yards, approximately. Under the contract there has actually been deposited on the yard between 75,000 and 80,000 cubic yards. The actual cost of doing the work for the Government will be the same whether the material is deposited ashore or deposited in deep water, as the price at which we took the work was identical in either case; and at time contract was let it was contemplated that part of the material would be taken to deep water, as the Government only agreed to take 49,000 cubic yards on the yard.
>
> Having deposited on the yard the amount we have, we hardly think you should require us to do this at a loss when it was originally contemplated that a large portion of the material would be taken away.

When the Government let the contract for the remainder of the work, having the right under the original contract to have the spoil deposited either on the station or in deep water, it provided for dumping in deep water, which was the cheaper mode of performing the work.

It is stipulated also (R., 33) that the Government duly advertised for bids, and—

> That P. Sanford Ross was the lowest bidder at said advertisement, and said contract for the completion of said work was regularly entered into between the United States Government and said P. Sanford Ross in the manner required by the laws and regulations of the United States for the doing of such work by contract, *and the contract price was the lowest the Government could obtain through such bid.* Said advertisement so published was as follows:
>
> "Sealed proposals, endorsed 'Proposals for dredging' will be received at the Bureau of Yards and Docks, Navy Department, Washington, until 1 o'clock, May 11, 1901, and then and there publicly opened, for dredging at the naval station, Port Royal, S. C. Appropriation to be expended, $87,000. For plans, specifications, and forms of proposal address 'Commandant, Naval Station, Port Royal, S. C.' Mordecai T. Endicott, Chief of Bureau, Apr. 10, 1901."
>
> That the plans and specifications referred to in said advertisement were the same as those set forth in the contract between the Government and P. Sanford Ross attached to the complaint.

The contract with Ross and accompanying specifications are set out in the record, pages 14 to 22. Comparison with the contract with the Dredging Company and its accompanying specifications, pages 6 to 13 of the record, will show them to be identical except as to the parties and prices, and further excepting that Ross is to dump altogether in deep water.

So we have conceded and stipulated the facts that the work was completed in strict accordance with the original contract, by the most convenient and cheapest method, and at the lowest price obtainable, after proper advertising for proposals. The damages were held to the minimum.

The stipulation of these matters as facts upon which the case was submitted for determination by the court makes them competent evidence to prove whatever they have a tendency to prove, and precludes any objection of a formal nature.

Independently of any stipulation these matters are primary evidence of the fact to be proved, the damage necessarily sustained by the United States because of the breach of the contract, which could not be less than the lowest price obtainable after proper effort, for the completion of the work by the cheapest mode of doing it.

In *Mayor, etc., of New York* v. *Second Ave. Railroad Co.*, 102 N. Y. 572, the railroad company had failed to perform its contract to keep certain streets in repair. The trial court directed a verdict in favor of

the city for the sum expended by it. This was assigned as error upon the ground—

> that the rule of damages for a breach of a covenant to repair, where the covenantor has neglected to perform his covenant, and the repairs had been made by the covenantee, is the reasonable cost of the repairs, and not the sum expended by the covenantee in making them, and that the question of reasonable expense should, under the evidence, have been submitted to the jury (p. 576).

The Court of Appeals, in sustaining the judgment of the lower court, said (p. 577):

> * * * But the work appears to have been done in the usual manner and by the agencies usually employed by the city in the prosecution of street repairs. We think the learned counsel for the defendant is correct in the proposition that the measure of damages for the breach of the defendant's covenant was the reasonable cost of the work. The city could not proceed in a reckless or extravagant manner and charge the defendant for expenses unnecessarily or unreasonably incurred. (*State* v. *Ingram*, 5 Ired. (N. C.) 441; *Rutland* v. *Dayton*, 60 Ill. 58.) But where a covenantee has made repairs which the covenantor was bound, but has neglected to make, and has proceeded in the usual way and no fraud is shown, nor any facts to impeach the reasonableness of the account, the sum actually expended in the work is, we think, *prima facie* the sum which he is entitled to recover. In the absence of proof neither fraud, reckless-

> ness nor extravagance will be presumed, and this measure of recovery presumptively gives the covenantor actual indemnity only.

In *Kidd* v. *McCormick et al.*, 83 N. Y. 391, 397, the court held that the actual cost of completing a building which a contractor had failed to complete was admissible as evidence of the damage sustained.

In *Baer* v. *Sleicher et al.*, 153 Fed. Rep. 129, the Circuit Court of Appeals for the Sixth Circuit had to deal with this question and went beyond our contention, and held that whatever is expended to complete the work may be recovered, if the expenditure was made in good faith. The court said (p. 133):

> * * * The sole question is whether such sums have been expended in good faith by the party of the second part in completing the work. If they have been, it is not for the jury to say that they are unreasonable or extravagant. The party of the first part in completing the work, occupied substantially the position of an agent for the party of the second part, and did not guaranty the wisdom of the purchase of labor or material.

## V.

### The question of mutuality.

What was the contract between the parties? The defendants in error say, in effect, that it was a contract to increase the channel of the Beaufort River in width and depth by dredging, "so as to form a deep water basin opposite the station." But not so. The contract was simply for dredging. The purpose of

the dredging was to form a deep water basin opposite the station, but the obligation of the contract might be fulfilled even though that purpose was not attained.

The contract proper provides (R., 6):

> That they, the said parties of the first part, will provide, furnish, and deliver, at their own risk and expense, at such place or places at the U. S. Navy Station, Port Royal, South Carolina, within 16 calendar months from the date of this contract, all the necessary materials and labor, tools, and appliances for the construction and completion, in all respects, of the dredging at said naval station, in strict accordance with, and subject to, all the conditions and requirements of the plans and specifications appended hereto, and which form a part of this contract, for the sum of fifteen cents per cubic yard for items 1 and 3, and ninety-nine cents per cubic yard for items 2 and 4, respectively, under paragraph 32 of the specifications above referred to.

This is plainly a contract for dredging and nothing more, unless something more is stipulated by the specifications.

The detailed description of the work found in the specifications is as follows (R., 8, 9):

**Specifications for dredging at United States naval station, Port Royal, S. C. Act approved June 10, 1896.**

> 1. GENERAL DESCRIPTION.—The channel of the Beaufort River shall be increased in width and depth by dredging, so as to form a deep water basin opposite the station. If required,

a part of the material dredged shall be deposited on the station; the remainder shall be disposed of elsewhere, as may be allowed by the engineer of the district.

2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated at about 1,000,000 cubic yards. This quantity is approximate only, and may be increased or diminished as the funds allotted for the work may allow or require. .

3. DRAWINGS.—They comprise a chart of the river showing the area to be dredged and a plan of the station showing points where a part of the material removed shall be deposited. These points and the quantity may be changed. The limits of the dredging may also be changed, all by the Government.

4. DREDGING.—The area shall be dredged to a depth of 30 feet below mean low water. Low water, for the purposes of this contract, is taken to be 13 feet below the coping of the dry dock at the naval station. The sides of the dredged area shall be sloped one on two. The channel to dry dock, between wing dams, about 90 by 130 feet, shall be dredged to a depth of 22 (or more) feet below mean low water, if required. The mean range of tide is 7.14 feet; maximum, about 10 feet. Dredging below 1 foot in excess of the depth required to be made will be deducted and not paid for. Shoals, lumps, or ridges left behind the dredge must be removed.

5. MATERIAL.—The material to be dredged is believed to be mostly mud, sand, or soft clay; underlying these it is possible that com-

> pact hard fine sand and clay may be encountered. Each bidder, however, is expected to examine and inform himself fully on all matters relating to the character of the work required by visiting the station and examining the site of the proposed work and plans.

Taking the contract and specifications together, and they provide for dredging to the extent which "the funds allotted for the work may allow or require." (R., )

Beyond the appropriation made by the act approved June 10, 1896, the parties could not go.

This appropriation might be sufficient to attain the purpose in view, and it might not be. The result attained would depend upon the expense of the work. But the dredging to the extent permitted by the appropriation was to be done in any event. If the full purpose of the dredging was not accomplished, the completion of the work would be a matter for another appropriation and another contract.

"The material to be dredged is believed to be mostly mud, sand, or soft clay." (R., 9.) If this belief proved to be well founded, approximately a million yards might be dredged under this contract, as the price for earth was fifteen cents per yard. If rock was encountered the extent of dredging done would be much less, as the price for rock was ninety-nine cents per yard.

When the specifications were drawn and proposals invited it was of course not known precisely what the bids would be, and they might well be low enough, if

the conditions were as anticipated, to secure the deep-water basin.

But the conditions were not well enough known to contract for definite results, and so the contract was made to dredge as much as the amount available from the appropriation made would pay for at the rate of fifteen cents per yard for earth and ninety-nine cents per yard for rock. This work the contractor agreed to do within sixteen months, and this work the Government agreed to pay for at the rate stated. And this is made after all a very definite contract, with mutual obligations, on the one side clearly defined work and on the other a clearly defined rate of pay.

The extent of the work to be done is approximately 1,000,000 cubic yards if the material to be dredged proves to be earth, as is anticipated; but necessarily it must be much less if the material proves to be rock, for the price of dredging rock is more than six times that of dredging earth; and the quantity of dredging is, in any event, limited by "the funds allotted for the work."

The material proved to be chiefly rock, for the New York Company dredged a total of 92,297 cubic yards, of which 27,001 yards were earth and 65,296 yards were rock. (R., 37, 38.)

But this did not change the contract in any way, as the contingency of rock being found was provided for and an appropriate price stipulated. It merely limited, because of the limited funds available, the

area that could be dredged, and that limitation was fixed in the contract.

There was, then, nothing indefinite and uncertain here. And both the parties, from the beginning to the end, proceeded in the view that the contract was for an amount of dredging measured by the money available to pay therefor; and this was known to be $150,000, less such sum as was required for what may be called the overhead charges always incident to such work.

It is respectfully submitted that the judgment of the Circuit Court of Appeals should be reversed and the judgment of the Circuit Court affirmed.

F. W. LEHMANN,
*Solicitor General.*

DECEMBER, 1911.

O

File No. 21,764

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1911

No. 100

Office Supreme Court, U. S.
FILED.
OCT 23 1911
JAMES H. McKENNEY,
CLERK.

THE UNITED STATES,
*Plaintiff in Error,*

vs.

JOHN McMULLEN and JOSEPH A. STULZ, as Administrator with the Will Annexed of the Estate of R. Percy Wright, Deceased,
*Defendants in Error.*

No. 100

**In Error to the United States Circuit Court of Appeals for the Ninth Circuit.**

## ARGUMENT AND BRIEF OF DEFENDANTS IN ERROR.

BURKE CORBET,
JOHN R. SELBY,
EDWARD J. LYNCH,
*Attorneys for John McMullen and Joseph A. Stulz, as Administrator, etc., Defendants in Error.*

*Filed this.....day of....., 1911.*

*JAMES H. McKENNEY, Clerk.*

*By.....Deputy Clerk.*

File No. 21,764

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1910

No. 281

THE UNITED STATES,
*Plaintiff in Error,*

vs.

JOHN McMULLEN and JOSEPH A. STULZ, as Administrator with the Will Annexed of the Estate of R. Percy Wright, Deceased,
*Defendants in Error.*

## ARGUMENT AND BRIEF OF DEFENDANTS IN ERROR.

Plaintiff in error seeks to hold defendants in error liable, as sureties, upon a bond given to secure the performance of certain work awarded by the plaintiff in error, and contracted to be performed by New York Dredging Company, a corporation. These defendants in error, as well as said named corporation, were all made parties defendant in the action in the Circuit

Court; all appeared in that action. The complaint declares against the New York Dredging Company, as principal, and these defendants in error, as sureties.

The complaint alleges:

1. New York Dredging Company, a corporation (Transcript of Record, 1).

2. Advertisement for bids to do the work (Trans. 2).

3. Offer by New York Dredging Company, pursuant to advertisement (Trans. 3).

4. Acceptance of offer of Dredging Company, and entrance into of contract pursuant to such acceptance by "New York Dredging Company, as principal, and the " defendants, John McMullen and R. Percy Wright, as " sureties" * * * "*by which said contract the said* " *defendant, New York Dredging Company,* agreed to " execute certain work", etc. (Trans. 2).

5. "*Defendant, New York Dredging Company, failed,* " *refused, and neglected to perform,* etc." (Trans. 2).

6. "The Secretary of the Navy did declare the said " contract with the said *New York Dredging Company* " abrogated, null, and void, for the following reasons, " to wit, *because the said New York Dredging Company* " did not fulfill the terms and conditions *by the said* " *New York Dredging Company agreed to be per-* " *formed*" (Trans. 2).

7. "Advertisement for proposals to complete *the said* " *work of dredging which the said New York Dredging* " *Company failed,* etc." (Trans. 2).

8. Letting of contract to another contractor to complete said work of dredging to P. Sanford Ross (Trans. 3).

9. Performance of conditions by plaintiff (Trans. 3).

10. "Simultaneously with the execution of the above " mentioned contract, 'Exhibit C', by and between the " defendant, New York Dredging Company * * * " the said New York Dredging Company, agreeably to " law * * * , and the defendant, John McMullen, " and the defendant, R. Percy Wright, severally duly " executed their and each of their joint and several " writing obligatory or bond, etc." (Trans. 3).

11. "The defendant, New York Dredging Company, " has failed, neglected, and refused to perform the terms " and conditions of the contract agreed by them to be " performed", etc. (Trans. 3). Allegation of damages (Trans. 3).

12. Demand upon New York Dredging Company *as principal,* and a like demand upon the defendants, John McMullen and R. Percy Wright, *as sureties* (Trans. 3).

Demand for judgment against New York Dredging Company *as principal,* and against the *defendants, McMullen and Wright, as sureties.*

Attached to said complaint, and made a part thereof, were a number of exhibits, as follows:

Exhibit "A". Request for bids to do the work (Trans. 4).

Exhibit "B". Offer of New York Dredging Company to perform the work at certain prices. Incorpo-

rated therein, and as a part of said offer, it is stated that said offer is made in strict conformity with the law approved March 3, 1863 (Trans. 5), and Section 14 of Act approved July 17, 1862, which latter section (Trans. 6) is set out in full and reads as follows, viz.:

"Sec. 14. And be it further enacted, *That no con-* "*tract or order, or any interest therein, shall be trans-* "*ferred by the party or parties to whom such contract* "*or order may be given to any other party or parties,* "*and that any such transfer shall cause the annulment* "*of the contract or order transferred so far as the* "*United States are concerned, etc.*"

Exhibit "A" (Trans. 6), is the contract made 25th of October, A. D. 1897, by and between the New York Dredging Company, as principal, and John McMullen and R. Percy Wright, as sureties, parties of the first part, and the United States, party of the second part, and contains these agreements: "That they, the said "parties of the first part, will provide, furnish, and de- "liver, at their own risk and expense * * * *within* "*16 calendar months from the date of this contract,* all "the necessary materials and labor, tools, and appli- "ances for the construction and completion, in all re- "spects, *of the dredging at said naval station, in strict* "*accordance with, and subject to, all the conditions and* "*requirements of the plans and specifications appended* "*hereto.*"

Attached to Exhibit "C", and made a part thereof (Trans. 8, 9, 10, 11, 12 and 13): "Specifications for "dredging at United States naval station, Port Royal, "S. C. Act approved June 10, 1896."

(Trans. 8) Paragraph Two thereof reads as follows:

"2. QUANTITY OF DREDGING.—The amount of material to be removed is estimated at about 1,000,000 cubic yards. This quantity is approximate only, and may be increased or diminished as the funds allotted for the work may allow or require."

(Trans. 10 and 11) Paragraphs 16, 17, 18, 19, 20 and 21 read as follows, viz.:

"16. TIME OF COMMENCEMENT OF WORK.—*The contractor shall commence work within thirty days from the date of signing the contract and continue without interruption, the entire work to be completed in sixteen calendar months from the date of contract.*

"17. PROGRESS OF WORK.—*If at the close of any working month the progress of the work shall not have been such as to indicate that it will be completed within the time specified in the contract, the government may refer the matter to a board of three officers, and, if recommended by them and the interests of the government so require, annul the contract and complete the work in such manner as it deems best, at the expense of* THE CONTRACTOR AND HIS SURETIES.

"18. UNAVOIDABLE DELAYS.—*When an unavoidable accident, storm,* OR OTHER ACT *of Providence occurs, through which the progress of the work is or seems likely to be delayed, the contractor shall immediately notify, in writing, the officer in charge of the occurrence, in detail, and state in what way and to what extent it will delay the fulfillment of his contract,* IN ORDER THAT THE NECESSARY INVESTIGATION MAY BE MADE

" AND THE MATTER PUT ON RECORD. *And it is clearly to* " *be understood that, unless it be done whenever such* " *thing occurs, no subsequent application for an exten-* " *sion of time for the completion of the contract on ac-* " *count of such occurrence will be recommended.*

" 19. AVOIDABLE DELAYS.—*Should the progress of the* " *work be delayed by anything but unforeseen and un-* "*avoidable accidents, storms, or other acts of Provi-* " *dence, or by the action of the government, no appli-* " *cation by the contractor for an extension of time for* " *the completion of his contract will be recommended* " *by the officer in charge for favorable consideration,* " *except on condition that the contractor make good any* " *deterioration caused by such delay and bear the addi-* " *tional cost of supervision and inspection by the gov-* " *ernment, and other expenses caused by the failure of* " *the contractor to fulfill his contract with the United* " *States according to its terms;* and *by granting the ex-* " *tension of the time asked for there shall be reim-* " *bursed* to the United States *by the contractor the* " *amount of such additional charges, to be deducted* " *from any money that may be or may become due him* " *from the United States under this contract, the dif-* " *ference only to be paid him upon his receipt.*

" 20. AUTHORITY FOR EXTENSION OF TIME.—*No exten-* " *sion of time for the completion of the work will be* " *made except upon the authority of the Secretary of* " *the Navy.*

"21. DAMAGES FOR DELAY.—*In case the completion of* " *the work shall be delayed beyond the period fixed upon*

*" for the completion of the contract, deductions of $50 " per day during such delay may, in the discretion of " the Secretary of the Navy, be made from the contract " price of said work as liquidated damages."*

Also attached to Exhibit "C", and made a part thereof (Trans. 14), is the bond given by New York Dredging Company, *as principal,* and these defendants in error, John McMullen and R. Percy Wright, as sureties, conditioned as follows, viz.:

" The condition of the above bond is such *that if the " said above bounden New York Dredging Company, " their heirs, executors or assigns, shall well and truly " and in a satisfactory manner, fulfill and perform the " stipulations of the contract hereto annexed, entered " into with the Chief of the Bureau of Yards and Docks, " acting under the directions of the Secretary of the " Navy, for and in behalf of the United States, and " shall conform in all respects to said contract, and to " the plans and specifications attached thereto and " forming a part thereof, and to the satisfaction of the " Chief of the Bureau of Yards and Docks, and shall " promptly make payments to all persons supplying him " or them labor and materials in the prosecution of the " work provided for in the aforesaid contract, then this " obligation to be void and of no effect; otherwise to " remain in full force and virtue."*

Exhibit "D" (Trans. 14 to 24). Contract with P. Sanford Ross, for completion of the work of the cancellation of the New York Dredging Company's contract, including specifications and bond.

Judgment against New York Dredging Company has become final.

The defendants in error answered to the complaint, and upon information and belief denied the allegations contained in the 5th, 6th, 7th, 8th, 9th and 11th paragraphs of the complaint (Trans. 25, 26, 27), and as a separate answer and defense, these defendants in error answered as follows, viz.:

"1. On February 15, 1899, the plaintiffs extended the "time within which the defendant New York Dredging "Company was, by the terms of said contract entered "into October 25, 1897, annexed to the complaint herein "and marked 'Exhibit B', to have been fulfilled by said "New York Dredging Company, and the work men- "tioned therein was to have been completed, from Feb- "ruary 15, 1899, to December 30, 1899.

"2. Said time was extended, and the condition of said "contract was in that regard changed by said plaintiffs, "without the consent of said defendants John McMullen "and R. Percy Wright, the sureties in the writing "obligatory or bond mentioned in said complaint, copy "of which is annexed thereto and marked 'Exhibit E'.

"Wherefore said defendants pray judgment that the "plaintiffs take nothing by their action against them" (Trans. 27).

We have set forth, at some length, the pleadings, for the reason that plaintiff in error, in the Circuit Court of Appeals, but not in the Circuit Court, suggested that these defendants in error should be held liable as joint contractors under the contract of October 25, 1897, if

not upon the bond, as sureties. The only issue tendered in the complaint was upon the liability of these defendants in error, as sureties upon the bond.

The complaint alleges the acceptance of the bid of the New York Dredging Company to do the work (Trans. 2); that the contract was made by New York Dredging Company, as principal, and McMullen and Wright, as sureties, "by which said contract *the defendant, New "York Dredging Company*, agreed to execute certain "work" (Trans. 2). "*Defendant, New York Dredg-"ing Company, failed, refused and neglected to per-"form, etc.*" (Trans. 2). "The Secretary of the Navy "did declare the contract with the *New York Dredging "Company* abrogated, null, and void * * * because "the said New York Dredging Company did not fulfill "the terms and conditions *by the said New York "Dredging Company agreed to be performed*" (Trans. 2). "The defendant New York Dredging Company has "failed, neglected, and refused to perform the terms "and conditions of the contract agreed by them to be "performed" (Trans. 3).

The terms of the bond (Trans. 14) conditioned: "If "the said above bounden New York Dredging Com-"pany * * * shall well and truly * * * per-"form the stipulations of the complaint hereto an-"nexed".

The contract was awarded (after competitive bidding), by the government to the New York Dredging Company (Trans. 2).

Under the statute no interest in the contract "shall " be transferred by the party or parties to whom such " contract or order may be given to any other party " or parties" (Trans. 6). Thus it will be seen from an examination of the complaint in the action that there is no *allegation or assignment of any breach by defendants in error in failing to keep or perform any covenant or part of the contract sued upon.* There is such an allegation so far as the New York Dredging Company is concerned (Trans. 2, Par. 5). There is no allegation of claim of any kind in the complaint against these defendants in error, saving and excepting under their liability upon the bond, arising out of the failure of the New York Dredging Company to complete the contract.

No attempt was made by the plaintiffs in error in the Circuit Court to claim that a recovery might be had against these defendants in error as joint contractors their whole theory, and the theory of the complaint, was against the New York Dredging Company on the contract, and these defendants in error on the bond. Had a different position been taken in the Circuit Court, *the answer of these defendants in error would have instantly been, that the complaint did not state a cause of action against them, based on the contract.* It was not until this action had reached the Circuit Court of Appeals that the government changed front and took the position that these defendants in error were also liable upon the contract, as joint contractors. This position was assumed too late to avail the government of any such

contention. It was too late in the Circuit Court of Appeals, and is too late in this court. The question now cannot be urged.

Therefore, defendants in error contend, that the right of this plaintiff in error to recover under the pleadings, is predicated upon its right as obligee in the bond, and against these defendants in error, as sureties therein, and upon no other grounds: It is upon this premise that the controversy correctly presents itself to the court for its determination, as controlled by the defense set up by the answers of these defendants in error, and upon the agreed statement of facts presented in the transcript.

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I.

## The Time of Performance Was Extended Without the Consent of Sureties, and Thereby They Are Discharged.

(Trans. 36, Finding II.) "The time fixed by the con-" tract for the completion of the work was sixteen " months from the date thereof, October 25, 1897", which said time was up February 25, 1899.

(Trans. 37, Finding IV.) "On February 15, 1899, " the time allowed by the contract for completing the " work was, by authority of the Secretary of the Navy, " extended to December 30, 1899".

The request for this extension, and the granting thereof, was made without the knowledge of or concurrence

therein, or consent thereto, by the sureties or either of them (Trans. 36, Finding III, and Trans. 40 and 41, Finding XX.)

The proposition is elementary that a surety cannot be held liable beyond the express terms of his contract: that when his undertaking is to secure the performance of an existing contract, if any material change is made in the requirements of that contract without the surety's consent, he is discharged. This results from the change itself, and it is immaterial whether change be for surety's detriment or benefit.

*Miller v. Stewart,* 9 Wheat. 680;
*Reese v. U. S.,* 9 Wall 13; Fed. Cas. 9591;
*Driscoll v. Winters,* 122 Cal. 66.

There is but one rule for the construction of a surety's obligation to perform a contract of suretyship, and that is the "rule of *strictissimi juris*".

At the outset of this argument we wish to challenge the position the government contended for in the Court of Appeals (and we assume it will renew the same contention here), that the sureties having signed the contract and being therein designated jointly with the New York Dredging Company as "*parties of the first part*", and the contract further showing that the "*parties of the first part*" agreed to perform certain things, and that in consideration thereof the "*parties of the first part*" were to receive compensation therein designated for such performance, that the sureties "should at least be treated as acting as sureties for a compensation"; that the rule "*strictissimi juris*" should be relaxed and

not applied in this case as the sureties were compensated sureties and a different rule should prevail.

That these defendants in error were or are compensated sureties needs but to be mentioned to refute such contention. They are described in the contract as sureties (Trans. p. 6). The bond attached to the contract and made a part thereof (Trans. pp. 13 and 14) describes them as sureties. They justify as sureties in the usual and ordinary manner prevalent in the execution of such instruments by sureties and in the manner common to such transactions in use long prior to the introduction into the field of sureties for pecuniary profit by corporations formed for the express purpose of incurring and discharging suretyship obligations.

Aside from the chimerical argument of counsel, predicated upon the contract in the manner above indicated, there is absolutely no foundation for the assumption by counsel that these defendants in error were compensated sureties; there is not the slightest showing that these defendants in error were paid or received any compensation for becoming or acting as sureties, the argument of counsel refutes such suggestion. *The consideration to be paid by the government under the contract was as consideration to be paid to the New York Dredging Company for performing the work, the subject matter of the contract, and not as compensation to the sureties for becoming or assuming the obligation of sureties or guarantors.* Neither the government nor the New York Dredging Company paid any consideration to the sureties for the assumption of any obligation of any kind whatsoever.

The government has placed upon this transaction a construction from which it cannot now recede, which is the opposite of the contention for the first time urged in the Court of Appeals upon its application for a rehearing and again urged here, and too late in any event to be brought to the attention of the court for determination. By the complaint, to which we have heretofore directed the court's attention, the position was taken that the *sole contracting principal* was the New York Dredging Company. It was the real party obligated to perform the terms of the contract, and it was the sole party receiving any consideration therefor. It was the sole party in default under the contract, and that the sureties were not in any manner receiving any compensation as the result of the contract obligations existing between the government and the New York Dredging Company. The sureties were obligated as sureties under the bond only by reason of the failure of the New York Dredging Company to perform the contract. The sureties received no consideration, they were not compensated sureties. No showing has or can be made that they were compensated sureties, it would be foreign to the fact. This court has not determined that there should be one rule applied to compensated sureties and another to sureties without compensation or accommodation sureties, and we submit that there should be no such distinction. Nor should the strict rule of construction be relaxed any more as to the one than to the other; each enters into the contract of suretyship

> "in reliance upon the rule of *strictissimi juris* and with the understanding that he is entitled to the

ordinary protection accorded to guarantors against changes in the contract".

*Guarantee Co. v. Pressed Brick Co.,* 191 U. S. 416;

*U. S. v. American Surety Co.,* 200 U. S. 197.

In *A. T. & D. Co. v. Town of Laurinburg,* 163 Fed., at page 695, the Court of Appeals, Fourth Circuit, seems to think the rule above mentioned should be relaxed against compensated sureties, as does also the Superior Court of Washington in the case *Henry v. Artona Ins. Co.,* 79 Pac. 42, and the Superior Court of the State of Missouri in the case of *Boppart v. Illinois Surety Co.,* 126 S. W. at p. 771; but a different view is entertained by the Texas courts, as found in *Lonergan v. S. A. L. & T. Co.,* 104 S. W. 1067:

"The honorable court of Civil Appeals sustained this proposition, holding that the surety company was in this case not entitled to the same protection of the law that would be accorded to a surety who executed the same bond without compensation, and cite the following cases in support of that conclusion: Cowles v. U. S. Fid. & Guar. Co., 32 Wash. 124, 72 Pac. 1033, 98 Am. St. Rep. 838; Pac. Bridge Co. v. U. S. Fid. Co., 33 Wash. 57; 73 Pac. 775. Both of the cases cited were decided by the Supreme Court of Washington In neither case is any reason assigned why there should be a difference in the rights of a compensated and voluntary surety, and we have been unable to discover a plausible ground for such distinction. How it could be that receiving compensation by the surety would affect the relation between the surety on the bond and the owner of the building has not been suggested by counsel and is not apparent to us. The well-established rule that material changes in the

> contract, made without the consent of the surety, will discharge him from liability, is based upon the clear and distinct ground that the surety's obligation is to answer for the contract as it is made, and a material change destroys that contract and substitutes a new one, for which the surety has not contracted to be responsible. Why should a compensated, any more than a voluntary, surety be held to guarantee a contract to which he has not consented? The proposition antagonizes the fundamental requirement that to make a valid contract the minds of the contracting parties must meet and agree upon its terms. We are of opinion that the holding of the Court of Civil Appeals upon this question was error."

This question is not before the court as we view this case, and would be but obiter dictum if passed upon by the court at this time.

Mr. Justice Clifford, in delivering the opinion in *Smith v. United States,* 2 Wall., at bottom of page 235, on the contract liability of sureties, states:

> "Whenever the contract is varied *by giving time to the principal* or by an alteration of the contract, it presents a new cause of action to which the surety has never given his assent, and with which, therefore, he has nothing to do."

And again, at page 237:

> "correct rule we think as stated by Lord Brougham in Bonar v. Macdonald and which is substantially the same as that adopted by Mr. Burge in his treaties on surety. Substance of the rule is, that any variation in the agreement to which the surety has subscribed, which is made without the surety's knowledge or consent and which may prejudice him or which may amount to a substitution of a

> new agreement for the one he subscribed, will discharge the surety upon the principle of the maxim *non haec in foedera veni.*"

In *United States v. McIntyre,* 11 Fed. at page 597, the court uses this language, viz.:

> "I think it fundamental that any change in the contract for which the surety is liable, made without his consent, will operate his discharge. The surety assumes the performance of a certain contract, and his liability is conditioned inflexibly upon the continuance of that particular contract. As stated by a distinguished judge, '*He who would charge a surety for his principal's breach of contractual duty must travel without deviation the way pointed out in the contract, however iron-bound it may be, for there is for the surety in the enforcement of his bond no equity nor latitude beyond its strict terms*' ".

The contract was changed, so it is found by the agreed case, the sureties are thereby discharged, unless the United States can show their consent. In *U. S. v. Freel,* 186 U. S. 309, the complaint showed the change. The sureties demurred and the court held it was incumbent on the plaintiff to plead consent to the change, and demurrer sustained. In the case at bar the agreed facts show the change and there is no showing of consent. Hence sureties are discharged.

**1. A CHANGE IN THE TIME OF PERFORMANCE OF A CONTRACT IS A MATERIAL CHANGE, AND WILL RELEASE SURETIES.**

In *Earnshaw v. Boyer,* 60 Fed. 528, in the Circuit Court for the Western District of Pennsylvania, it ap-

pears that the plaintiff purchased all of the ore to be produced by the Marbella Iron Ore Company during the year commencing March 1, 1890, and ending March 1, 1891, and sold one-third of the amount to McHose & Sons, the contract with whom provided that "s ipment " shall be made in as nearly equal monthly proportions " as possible". The defendant became surety for McHose & Sons.

On December 17, 1890, the plaintiff wrote to that firm: "I have notified the Marbella Company that as they " delayed shipments at the beginning of the contract a " month, they will have to give us a month more to move " the ore, or else we shall simply be swamped with the " quantity arriving so closely together. I have taken " it for granted that this will please you, but if you " would prefer to have your one-third shipped by the " first of March, please let me know." To this, under date of December 18, 1890, McHose & Sons replied: " The arrangement which you propose regarding the " extension of time for delivery of Marbella ore, is sat- " isfactory"; and this reply was taken as an acceptance of the proposal, and the arrangement referred to was accordingly pursued. This, however, was without consent of the surety. Disposing of the case, Dallas, Circuit Judge, said (p. 530):

> "It is quite manifest that the parties understood this to be a new agreement by which the definite time which they had supposed had been originally agreed upon for the completion of the shipments was extended for one month. But if this was a mistake; if the effect of the contract was to require that the shipment should be made in a reasonable time, yet the substitution of a fixed and definite time

> would materially change it. * * * The principals were dealing with a matter which concerned the surety as much as it did themselves, and yet (not considering this matter of reasonableness at all) they agreed upon an arbitrary time, without consulting him, and in utter disregard of his right, either to be made a party to any such agreement, or to have the question of a reasonable time determined by judicial investigation. * * * McHose & Sons, without consent of the defendant, and in modification of the contract to which his contract related, assented to a definite time for completion of shipments; and this they did by positive contract. * * * The principals of law applicable to this case were considered by the Supreme Court in Reese v. U. S., 9 Wall. 14."

Accordingly it was held that the extension of the time for the delivery of the ore, for one month, extinguished the liability of the surety.

*Rowan v. Sharp's Rifle Manufacturing Company*, 33 Conn. 1.

There the Robbins & Lawrence Company, as parties of the first part, entered into a contract with Fox, Henderson & Co., as parties of the second part, whereby the parties of the first part agreed to manufacture and deliver to the parties of the second part, 25,000 rifles "with all possible dispatch", in such place in the cities of New York or Boston as the parties of the second part or their agent should designate; the price of the rifles to be $15.50 each. For the performance of the contract by the parties of the first part, and for the repayment by them, in case of its non-fulfillment, of money advanced by way of prepayment for the rifles to be manufactured, the defendant became a surety.

Before any of the rifles were delivered, a supplementary contract was entered into by the parties of the first and second parts, but there was no assent to it by the surety. That contract provided that three hundred rifles per week should be delivered for a certain period, and six hundred per week afterwards. Having stated the changes made in the time fixed for the delivery of the rifles, Hinman, J., speaking for the Supreme Court of Connecticut, said (p. 23):

> "We do not stop to inquire whether these changes might not, as suggested by the petitioner's counsel, have been for the benefit of the surety. It is enough, we are satisfied, that they were material changes which destroyed the identity of the contract secured, and clearly justified the surety in saying that he never became a surety for the performance of the substituted contract. Manufacturers' Bank v. Cole, 39 Maine 108; Samwell v Howarth, 3 Merivale 272.
>
> "It was insisted upon by counsel that these changes of the time of delivery were only a specification by the parties of what in their view was a reasonable time for such delivery. We do not think so. * * * It appears to us very clear that a contract to manufacture and deliver a large quantity of any description of goods in a reasonable time, and a contract to manufacture and deliver the same quantity either at a specified time for the whole or a specific quantity from time to time, monthly or weekly, as the case may be, are materially variant."

The case last quoted is cited in the opinion of the court in *United States v. Freel, infra,* and there spoken of as " an important case".

*U. S. v. Freel*, 92 Fed. 299; 186 U. S. 309.

Defendants were sureties on a bond given to the government to secure the performance of a contract to construct a dry-dock. The original contract was dated November 17, 1892, and contained certain provisions regarding how changes were to be made, and the compensation therefor. These clauses are set forth in 186 U. S., pp. 311 and 312. They conclude, "*And provided "further, that no change herein provided for shall in "any manner affect the validity of this contract.*" On June 16, 1893, a supplemental contract was made between the government and the principal, providing that the dry-dock should be increased in length from 600 to 670 feet, and fixing the compensation therefor all in accordance with the method outlined in the original contract for changes in the contract. On August 17, 1893, another supplemental agreement was made by the government and the principal, changing the location of the dry-dock 164 feet, and extending the time of completion, originally 27 months, by 8 weeks. The complaint set forth these facts, and that subsequently, the work proceeding so slowly as to warrant the government in so doing, it proceeded to forfeit the contract, and complete the work in accordance with the plans and specifications as under the contract it had a right to do. Wherefore the plaintiff demanded judgment. Defendant, a surety, demurred generally. The question presented was whether the changes had released the sureties, who were not parties thereto and who had no knowledge of them, so far as the complaint alleged. The position of the government was that in

the original contract it was agreed that changes made as therein provided for should not avoid the contract; that the sureties therefore were held by that agreement to the changes, since they were such as were contemplated. The trial court held that this position was well taken, as to the first change, that increasing the size of the dock; but that, *as to the extension of time* and change of location, it was not tenable since those changes were not within the scope of the changes contemplated by the original contract and agreed to in advance. Demurrer was sustained by the trial court, and on appeal to the Circuit Court of Appeals and Supreme Court the decision was affirmed. *U. S. v. Freel* is a distinct authority that an extension of time in a building contract where the original contract provides for none, releases the surety. On that point it is surely a binding authority.

*U. S. v. Howell,* (1826) Fed. Cas. 15405.

> "If that contract is to pay money or to perform a particular act at a particular day, before which day the time of payment or performance is enlarged by a parol agreement between the obligee and the principal, without the assent of the surety, I hold that the surety is discharged, upon the ground that the terms of his contract are varied without his consent by the act of the obligee,"

but if the time for payment or performance has passed when extension is given, the surety could only use the defense by an equitable proceeding.

*Lane v. Scott,* 57 Tex. 367.

The time for the delivery of the merchandise agreed to be sold was extended beyond the time originally fixed, under a proposition made by one side, and acted on, if not formally accepted by the other. *Held,* That a surety on the contract was discharged.

*United States v. De Visser,* 10 Fed. 642.

Statute provided that goods in a bonded warehouse, if not withdrawn within three years "shall be deemed abandoned to the government, and shall be sold under such regulations as the Secretary of the Navy shall prescribe". Regulations provided that goods remaining over three years without payment of duty should be sold "at the first quarterly sale thereafter". Goods were not sold for over three years after period expired. Held, surety on warehouse bond discharged because the sale was not had at the proper time. The court uses this language at pages 657 and 658:

> "A surety's contract is in this respect strictissimi juris. Any prolongation of his risk, or change in the subject-matter of it, is an alteration of the contract in an essential particular; and if made without the surety's consent discharges him from liability; and this applies equally to the United States, and to any alterations of the contract made through the acts of its officers: U. S. v. Hillegas, 3 Wash. C. C. 70; U. S. v. Tillotson, 1 Paine, C. C. 305; U. S. v. Boecker, 21 Wall. 652; Miller v. Stewart, 9 Wheat. 681; King v. Baldwin, 2 Johns. Ch. 560; Grant v. Smith, 46 N. Y. 93; Cooke v. U. S., 91 U. S. 396; U. S. v. Boswick, 94 U. S. 66.
>
> "The United States, when they contract with their citizens, are controlled by the same laws that govern the citizen in that behalf. All obligations

which would be implied against citizens under the same circumstances, will be implied against them."

"If the secretary of the treasury had by express order, at the owner's request, extended the period of three years within which to pay the duties without the surety's consent, it cannot be doubted that such an extension of time would have discharged the surety, because it extended the duration of his risk. U. S. v. Hillegas, supra.

"An extension of the time of payment discharges a surety, because it prolongs his risk by postponing his right of payment and subrogation, and by depriving him of his right of immediate recourse by suit against his principal for indemnity at the time when the debt was originally due. The contract by such extension is varied to his prejudice. U. S. v. Hillegas, 3 Wash. C. C. 76; King v. Baldwin, 2 Johns. Ch. 560; Warner v. Beardsley, 8 Wend. 201; Brown v. Williams, 4 Wend. 360, 367."

In *Whitcher v. Hall,* 5 B. & C. 269, referred to and digested in the *Freel* case, it was held by the King's Bench that a surety engaged for another to the plaintiff for the milking of thirty cows per day, at a given price per annum, was released by a subsequent agreement without his assent, whereby the hirer was to have twenty-eight cows for half the year and thirty-two for the remainder.

The rule that an extension of time for performance discharges the surety has also been expressly held in the following cases:

*Samuell v. Howarth,* 3 Merivale, 272.

A. guaranteed payment for any goods supplied by B. to C. between April 2, 1814, and April 2, 1815. Although no period of credit was specified, this could not

be taken as a guarantee for an unlimited period, but to be restricted to the usual course of trade; and C., having accepted bills for amount of goods delivered, which B. permits him to renew when payable, without communicating to A. the subject of such renewal; *Held,* A. discharged from his guarantee by virtue of the rule that a creditor giving further time to principal debtor, without consent of surety, releases the surety, and that although it was found that renewal was given only in consequence of C.'s inability to pay, and *no injury could accrue* to A., the surety being himself the fit judge of what is or is not to his benefit.

*Todd v. School Dist.,* 40 Mich. 294.

Where it was held that assignment of contract to other parties, and extension of time for completion, discharged the sureties.

*Judah v. Zimmerman,* 22 Ind. 388.

Extension of time and addition to building discharged surety.

In the following cases the rule has been recognized and approved:

*Barber v. Burrows,* 51 Cal. 404.

In *Fidelity Dep. Co. v. U. S.,* 137 Fed. 866, it was held that an interruption by the U. S. shortening the time for performance from 12 to 9 months effected a substantial deviation in the contract which the surety guaranteed, and it was discharged. The opinion closes with these words:

> "The rule is familiar that any material alteration or deviation from the terms of a contract for the performance of which a surety is bound, made by the parties without his consent, will release him from his obligation. United States v. Freel, 99 Fed. 237, 186 U. S. 309."

Since it is the alteration of the contract, not the increase of risk, that discharges surety, we submit that, in the case at bar, there is greater reason for the discharge of surety than where the time was shortened to nine months from twelve, since here it was extended to twenty-six months from sixteen.

*Victor S. M. Co. v. Scheffler,* 61 Cal. at page 532.

Action on bond signed by principal and surety for performance of contract containing the following language: "The consignee should never at any one time " have on consignment more than six machines", the bond (page 523) sued on provides that the contract or agreement "may be varied or modified by the mu- " tual agreement of said Sewing Machine Company and " said Samuel G. Lonsdale (principal) as the manner of " carrying on said business, or as to the compensation " to be paid the said Lonsdale, or as to the period of " which said Lonsdale shall report to and pay said com- " pany for the machines he may sell, or as to the terri- " tory in which said machines shall be shipped or sold, " and *such changes and modifications or variations shall " in nowise affect or impair our liability on this bond.*"

More than the stipulated number of machines were on consignment. The court held that this modified the contract and that the surety was released.

In the Court of Appeals the contention of the government on this point was that the original contract provided in terms that under certain conditions the government, if the Secretary of the Navy authorized it, was bound to grant an extension of time for the performance of the work. It took the position that "The " parties deliberately provided that on the existence of " certain conditions extensions should be granted." We fail to find any such provision in the contract.

Specifications 18, 19 and 20 are claimed to be this provision (Trans. p. 11). We submit that it is doing violence to the plain meaning of language to hold that these specifications, even standing alone, without reference to the rest of the contract and specifications, give the contractor any right to an extension, or provided that under certain conditions the time for performance should be extended. Specification 18 states that unless notice is given of unavoidable delays immediately, no subsequent application for extension of time will be recommended. Does this mean that if there is unavoidable delay, and notice has been given immediately, the extension must or shall be granted? Clearly not. Does it even mean that if the notice has been given immediately, the extension must or shall be recommended? Clearly not. Specification 19 is to the effect that if the delay has not been unavoidable, no extension will be recommended by the officer in charge unless the contractor reimburse the United States, for deterioration and additional expense. Does this mean that if the contractor offer to so reimburse the United States, or do actually reimburse the United States, that the extension must or shall be grant-

ed? Clearly not. Does it even mean that if the condition is complied with, the extension must or shall be recommended by the officer in charge? Clearly not.

Finally, specification 20, "No extension of time for the "completion of the work will be made except upon the "authority of the Secretary of the Navy", is referred to by defendants in error in the following language:

"The Specification opens with the language, 'Author-"ity for extension of time'. These words in themselves "convey the idea that some person shall have author-"ity to extend the time. Specification provides as fol-"lows: (Quoting it.) By this language the parties to "the contract centered authority in the Secretary of the "Navy to grant an extension."

If such is the case, the parties to the contract used words in a very remarkable sense, and not according to the accepted usage of the English language.

Taking these three specifications together, we do not think it can be said that the contract provides for extensions of time in the sense plaintiffs in error claim, to wit: "The parties deliberately provided that on the "existence of certain conditions extensions should be "granted." We have hereinbefore pointed out the proper construction and use of these specifications, and we submit that our construction is the true one.

The entire contract must be read together, and harmonized, if possible; the contract shows beyond any doubt that it was a contract for the construction of the work within sixteen calendar months, and that the government need grant no extensions for any cause what-

soever, and that neither the Secretary of the Navy, nor any other person, was appointed as an arbiter or judge to determine what extensions should be granted, or to grant the same for any cause whatever. Immediately preceding these three specifications is specification 17 (Trans. p. 11), on which great stress is laid by the Government in another connection. This specification gives the United States the right to annul the contract even before the time for completion arrives, if it is apparent that the work will not be completed by the date set. This specification would have no weight unless there was a certain definite time for the completion of the contract, regardless of delays for any cause. The United States insist very strongly that this is a valid specification, and that the annulment finally made was under this specification.

Specification 21 (Trans. p. 11), immediately following the three specifications relied upon, provides that if the completion of the work is delayed beyond the period fixed by the contract, deductions of $50.00 per day during such delay may be made as liquidated damages. This specification clearly contemplates a definite fixed time for completion, and under it no provision is made for delays, however caused, unavoidable or avoidable.

Specification 16 (Trans. p. 10), is to the effect that the work shall be done within sixteen calendar months; and the provision of the signed portion of the contract is the same (Trans. p. 6). Taking the contract altogether, we think there can be no doubt that it was for the completion of the work within sixteen calendar months from the date of the contract.

Some cases are cited illustrating extensions of time in contracts. A reference to these cases will very clearly show how provisions for extensions of time are expressed; and how differently from the specifications in the case at bar. Counsel for the government rely on the case of *United States v. Gleason,* 175 U. S. 588, page 603. In that case the language of the contract was:

"The said Gleason & Gosnell shall commence work "under this contract on or before the twentieth day "of August, 1885, and shall complete the same on or "before the thirty-first day of December, 1886. * * * "Provided, however, that if the party or parties of "the second part shall, by freshets, ice or other force "or violence of the elements, and by no fault of his "or their own, be prevented either from commencing "or completing the work or delivering the materials "at the time agreed upon in this contract, such addi-"tional time may in writing be allowed him or them for "such commencement or completion, as, in the judg-"ment of the party of the first part or his successors "shall be just and reasonable."

It will be noted that immediately following the requirements of completion by a certain date, there is a *proviso* that if the parties are delayed by the elements and through no fault of their own, additional time may be allowed.

In *Davis v. La Crosse etc. Ass'n,* 99 N. W. 351, the question was as to the propriety of allowing liquidated damages to the defendant as an offset to the amount sued for by the contractor. The contract provision was that the building should be finished by November 1st,

but liquidated damages at the rate of $20.00 per day for each day completion was delayed should be allowed, *if the architect should certify that the work could have been completed by November 1, 1900.* The contract also provided that if the work was delayed not because of the fault of the contractor, and the contractor reported the delay immediately to the architect, "an allowance " for the same, as determined by said architect, *shall " be added* to the time stipulated for the completion of " said work". The decision was, that no notice had been given, the architect's certificate was final.

In *Curry v. Olmstead,* 59 Atl. 392, the contract provided:

" Should the contractor be obstructed or delayed " in the prosecution or completion of his work by the " act, neglect, delay or default of the owner or the " architects, * * * then the time fixed for the com- " pletion of the work shall be extended for a period " equivalent to the time lost by reason of any or all " of the causes aforesaid, but no allowance shall be made " unless a claim therefor is presented in writing to " the architects within twenty-four hours of the occur- " rence of such delay."

*Held,* that no allowance could be claimed where the notice had not been given.

In *Stubbings v. World's Col. Exp. Co.,* 110 Ill. App. 210, provisions for extensions of time were:

" The owners reserve the right, during the progress " of the work, to make * * * any alterations (etc.) " * * * and in case the alterations require additional

" time, a reasonable amount of additional time be given " for the completion of the work."

" Should delays be caused by other contractors to the " hindrance of the contractor, and it immediately gives " a notice to the Chief of such delay, a just amount of " extra time shall be allowed the contractor by the " Chief."

"The sum of $50 per day shall be deducted from the " contract price for each day the work is delayed in " completion after the specified date. If, however, prog- " ress of the work shall be delayed by any cause beyond " the control of the contractor, an extension of time may " be made by the Chief, but claims for such extension " must be made in writing at the time of such delay, and " a decision of the Chief thereon shall be final and " binding upon both parties."

Recovery was sought for the additional cost of the work to the contractors caused by delay in the completion not caused by the contractor, the prices of labor and material having risen. *Held,* that the decision of the Chief not binding as to the question of damages on breach of contract, although certain specifications made his decision final and binding as to all controversies arising in the execution of the contract.

Contrast the provisions of the four cases cited with the provisions in the case at bar. In each of them the provision is that for unavoidable delays a reasonable extension of time *shall be given;* and in the cases where liquidated damages are to be given, the clause referring to the liquidated damages provides that the same shall

not apply if the delay is not due to the fault of the contractor. In the case at bar the provision for liquidated damages does not contain any proviso; the time for performance is perfectly definite; and specifications 18 and 19 amount to no more than an announcement to prospective bidders that it would be very difficult to get an extension of time.

The government in another connection insisted very strongly that time was of the essence of the contract. Reference is made to the provisions for annulment and liquidated damages, and their statement was:

"There can be no doubt that the intention of the par-
"ties in the case before the court was that the contract
"should be completed in sixteen months. In the first
"place, this was agreed upon as the period in
"which the work should be finished. To insure com-
"pletion within the time, specification 17 made it the
"right of the government to annul the contract and
"complete it itself. Specification 21 specifically pro-
"vided for the payment of liquidated damages in the
"event the contract was not completed on time. The
"undertaking of the contractor and his sureties was that
"they would deliver the work complete at the end of
"sixteen calendar months from the date of execution."

That is our point. That was the contract, and it was changed without the consent of the sureties.

Again in the Court of Appeals the government took the position that "The government was entitled to have
"the work completed at the end of sixteen months." In

a case, *Phoenix Bridge Company v. U. S.*, 38 Ct. Cl. 492, cited by defendants in error, at the conclusion of the clause providing for forfeiture was this:

" But in case of overwhelming or unforeseen accident " by fire or otherwise, the circumstances shall be taken " into equitable consideration by the United States be- " fore claiming a forfeiture for non-delivery at the " time specified."

Yet the holding was that the United States could demand completion on the day set, although because of an overwhelming freshet a substantial part of the work was carried away. The court says,

> "If a party agree to perform that which is possible and does not, he is liable. It is only where an obligation is imposed by law and not by contract that an act of God or of Government will excuse him for non-performance."

Merely because the words "extensions of time" occur in the specifications is no reason for stating that the contract provides for extensions of time. Plaintiffs in error claim that it is a reasonable and proper provision to have in a contract that the time shall be extended under certain conditions. We freely grant that. *It is reasonable and proper, and very easily expressed; but it is not in this contract.*

The courts construe very strictly language claimed to be a consent in advance by the sureties to changes in the contract.

*Brandt on Suretyship,* Vol. 1, 3rd Ed., Sec. 423. (Note.)

"Stipulations by which sureties consent in advance to alterations in the contract between principal and creditor, seem to be strictly construed in favor of surety. Thus, an agreement that no 'extension of time' shall release the surety has been held to apply to only one extension." (Citing Trustee v. King, 85 Ill. Appeals, 220; Bank v. Chick, 64 N. H. 410; which so hold.)

See also

*Miller v. Spain,* 41 Ohio St. 376;

*U. S. v. Freel,* 186 U. S. 309;

*Plunket v. Davis Sewing Machine Co.,* 36 Atl. 115.

(Syllabus) "A guarantor of the faithful performance by an agent of a contract of agency within a certain county, the guaranty providing that the contract may be modified by an agreement in writing between the principals, is released from future liability by the subsequent extension of the agent's territory without any written agreement."

Accord:

*Lodge v. Kennedy,* 73 N. W. 524.

In *Reissaus v. Whites, infra,* the contract contained this language: "Subjected to additions and reductions " as may be hereinafter provided". *Held,* that this provision did not authorize the principal and contractor to change the original contract. We submit that it is a greater stretch of language in the present case to hold that the specifications provided for extensions of time.

A number of cases are cited which are stated to bear out the proposition that where a contract provides that

changes may be made therein as the work progresses, it is not necessary to consult the surety before making the change. The surety undertakes that the contract shall be considered flexible, and that its provisions may be altered. We find that in none of the cases was the surety a party to the original contract, and in all the cases there was a distinct provision that the owner should have power to alter the plans and specifications, and that such alterations should not in any manner invalidate the contract. In none of the cases is there a provision, as there is in the case at bar, that the changes shall be made in writing signed by the parties, where the sureties are such parties. We digest a few of the cases:

*Village of Chester v. Leonard,* 68 Conn. 495; 37 Atl. 397.

Contract gave board of water commissioners, right to change quantity and form, dimensions, and alignment of the work to be done. No provision requiring changes to be in writing signed by parties, and sureties not named parties to contract. "The parties to the construction " contract of October 17, 1892, were the Village of Ches- " ter and Francis Leonard" (the principal).

*Wehr v. St. Matthews Cong.,* 47 Md. 177.

Contract provided:

" And it is distinctly understood and hereby agreed, " that should the building committee, appointed by said " congregation, desire to make any changes from the " drawings and specifications at any time during the

" progress of the works, the same shall be carried out " by said S. & J. (contractors) without making void, or " in any manner affecting the contract."

Changes were made in manner prescribed in contract, and were of kind contemplated. Sureties did not sign original contract and no requirement that changes be signed by them.

*U. S. F. & G. Co. v. U. S.*, 191 U. S. 416; 48 Ded. 242.

Suit by material man against surety on government contractors' bond given in pursuance to act of August 13, 1894, 28 Stat. 278, c. 280, "for the protection of per- " sons furnishing materials and labor for the con- " struction of public works". Decision is that ordinary rules for discharge of surety do not apply to such a bond as against material men and others not the principal contracting parties.

> "In an ordinary guaranty the guarantor understands perfectly the nature and extent of his obligation. If he becomes surety for the performance of a building contract, he is presumed to know the parties, the terms of their undertaking, the extent and feasibility of the work to be done, the character and responsibility of the principal obligor, and his ability to carry out the contract. If he guarantees the payment of a particular debt, he usually knows the exact amount of the debt, the time when it matures, and something of the ability of the principal to meet it. If he becomes responsible for the payment of the principal's debts generally, or lends his credit to a proposed purchaser of goods, he knows the amount of his liability and the means of his principal to meet them. *In such cases he contracts in reliance upon the exact terms of his*

*principal's undertaking, and has a right to suppose that no change will be made without his consent; and the courts have gone so far as to hold that any change will exonerate him, though it really redound to his benefit."* (Italics ours.)

This case would seem to us a strong authority in our favor, and it certainly does us no harm, as it expressly approves the rule of *strictissimi juris* as applied to the liability to the owner.

*Am. Sur. Co. v. San Ant. Loan & Tr. Co.*, 98 S. W. 387.

Contract reserved to owner right to alter plans, etc., without in any manner invalidating contract. Surety not party named in original contract.

*Reissaus v. White*, 106 S. W. 607.

This case was considered *supra* on another point. It cites with approval the rule that where original contract provided for changes, they may be made without consulting surety, referring, of course, to contracts in which the sureties are not named as parties, and which do not provide that changes must be made by writing signed by parties. It cites *Beers v. Wolf*, relied upon and digested supra, clearly showing that an exception is made of such cases.

*Hayden v. Cook*, 34 Neb. 670; 52 N. W. 165.

Contract provided that owner should have right and power to make changes in plans, and such changes should not in any manner invalidate the contract.

The other cases are similar, and practically identical. The references to *Cyc.* and *Brandt on Suretyship* are to the effect that where the original contract provides that changes may be made therein without invalidating it, sureties are not discharged by changes made of the kind contemplated, and the cases cited are cases similar to those digested above, where there is a clear provision that changes may be made by the owner, and there is no provision that changes can only be made by writing signed by the parties, where the sureties are parties. It is clear that none of the authorities cited has any application to the present case for two reasons:

First. There is, in the contract under consideration, no provision that changes may be made therein by the owner without in any manner invalidating the contract;

Second. There is a provision that, if any changes are made in the contract, the same must be in writing signed by the parties, and the contract recites that the parties are the United States, New York Dredging Company and its sureties.

These authorities have no application to the case at bar. The time is extended by the authority of the Secretary of the Navy (see Agreed Statement, Paragraph IV, Trans., p. 73). The question of whether or not the extension was with or without authority does not enter into this discussion. The Agreed Statement is that the time was extended (Trans. p. 37). Merely because the original contract did not permit extensions of time without discharging sureties is no reason for holding that no extension was made. The United States,

in so far as it contracts with private individuals, is subject to the same laws, and its contracts are to be construed as though by private individuals. *U. S. v. Boswick,* 94 U. S. 66. Of course, the extension was by authority. If it was not by authority, it was not an extension, contrary to the agreed facts. In any case, the Secretary of the Navy would be the proper officer to bind the United States in a contract on the subject.

*Adle v. Metoyer,* 1 La. (Annual Reports) 254,

is cited, to the effect that implied consent to an extension may be shown against surety. In that case against the surety on a note, certain evidence was offered to show that the surety asked for the extension. It is not clear what application this has to the case at bar. The sureties have asked for no extension, and in no place does it appear that there is any conduct on their part implying consent. The Louisiana case uses the words "implied assent" in contradiction with written assent.

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**2. THIS CHANGE OF TIME OF PERFORMANCE AMOUNTED TO A NEW CONTRACT ON THAT POINT.**

While part of the contract was yet to be performed, the parties by mutual agreement changed one of its terms and substituted a new term on that point.

*Earnshaw v. Boyer;*
*Rowan v. Sharp's Rifle Mfg. Co.;*
*U. S. v. Freel;*
*U. S. v. Howell* (and other cases *supra*).

**3. JOHN McMULLEN AND R. PERCY WRIGHT WERE ENTITLED TO ALL THE RIGHTS AND PRIVILEGES OF SURETIES.**

The plaintiffs in error below conceded the general principle that a change in the contract by extension of time to the principal, not assented to by the sureties, discharged them; but contended that in the case at bar this rule could not obtain because, "the original con- " tract provides for extensions of time", and "the orig- " inal contract is signed by both principal and sure- " ties". It is true that the original contract is signed by the sureties; but it is signed by them *as sureties.*

We submit that by signing a bond attached to a contract, the sureties are estopped to deny knowledge of the terms of the contract as effectually as by signing both contract and bond, as here, as sureties; and conversely, that by signing the contract, as surety, no rights are lost which might have been preserved by merely signing the bond. This question is of some importance in view of the contention made that as some of the specifications attached to the contract refer to extensions of time, therefore the sureties must have expected that the time might be extended without notice to them.

The following case is instructive:

*Beers v. Wolf* (Beers v. Strimple) 116 Mo. 179; 22 S. W. 620.

Action by owners of hotel against contractors and their sureties. Contract described defendants as *"S. " and Sons, principals, and W., H., and R., sureties, " parties of the second part".* Contract provided that

the superintendent could make alterations in the plans without avoiding the contract, and that *in case of any such alteration the expense must be agreed on in writing, and signed by "said parties of the second part* and superintendent". *Held* the appellants, the sureties,

> *"did not waive their rights as sureties.* They are in the beginning of the contract described as sureties, and when we come to the agreements concerning the last two payments, the distinction between principal and sureties is again shown; and there is no statement in the contract to the effect that they contract as principals. *As they are described in the contract as sureties, it must appear from other parts thereof that they agreed to be bound as principals before it can be said that they waived any of their rights as sureties. The contract contains no statement to the effect that they bound themselves as principal, and they must have accorded to them the rights of sureties."*

Sureties discharged by alterations in contract not signed by them.

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#### 4. THE ORIGINAL CONTRACT DOES NOT PROVIDE FOR EXTENSIONS OF TIME.

The only contention made by counsel for the government in regard to the extension of time was that the original contract provided for extensions of time, and that therefore the sureties consented in advance by signing the contract to a proper extension and that the extension given was proper under the circumstances.

When it is said that a contract provides for changes or for extensions of time is meant either that there is

an agreement that certain changes will be made on request or extensions of time given, or that, if such change is made or extension given, the original contract shall not be invalidated. The contract in the present case does neither, and hence cannot be said to provide for extensions of time or other changes. Counsel for plaintiffs in error in the court below cited *Vol. 27 Am. & Eng. Encyc.* 495, to the effect that

> "if the alteration is provided for in the original contract or appears to have been within the contemplation of the parties when the contract was made, and therefore implied therein, * * * the surety is not discharged."

This was the position of the plaintiff in the trial court: That the sureties agreed to the extension of time when they signed the contract, because an extension is contemplated in the contract. The cases cited in the Encyclopedia to support this are all mentioned below, and in each the court held either that there was *no alteration* or else that the alteration had been made in fulfillment of the original contract, as where the original contract, a deed, provided "for further assurances" to be given and they were given. *In none of the cases is it held that, merely because it was apparently in the minds of the parties when making the contract that certain changes might possibly be made by subsequent agreement, the surety is bound by a subsequent agreement made without his consent.* It is only where the original contract provides that one of the parties *shall,*

not *may,* in certain cases make a change, or provides that no change made shall invalidate the contract, is the surety bound when the change is made.

The cases cited are:

*Pascault v. Cochran,* 34 Fed. 358.

This case held that a surety for the payment of the purchase price of land conveyed by deed containing covenant "for further assurances" is not discharged by the giving of a subsequent deed where it was discovered that the title was not in vendor at time of first conveyance. The court says:

> "What they did grant by the first deed was all the title and right they then possessed, believing that they held the fee, but, to guard against all mistake, and to provide for the curing of all defects, they, at the same time, and by the same instrument, covenanted with Henry S. Cochran, his heirs and assigns, *to make such further assurances as might become necessary to secure a good title.* The deed of October 26, 1878, was in fact nothing more than a carrying out of the original agreement,—a performance of the covenant that if the deed of August 5th should prove to be insufficient to convey a fee, the complainant and her husband would make it good by another conveyance."

*St. Louis Brewing Co. v. Hayes,* 71 Fed. 110.

This case is not in point at all as to the immediate question, as the court held that there was no change at all made in the original contract.

In *U. S. Glass Co. v. Matthews et al.,* 89 Fed. 828, it was held that a memorandum pasted onto the license was not in law an alteration of the license attached to

the bond, not in any way a change or alteration of the license, *and did not remotely touch any of the provisions the performance of which the surety had guaranteed,* certainly no material alteration. This case, then, does not have to do with changes contemplated by the original contract, and is not in point.

In

*Mattingly v. Riley,* 49 S. W. 799,

the syllabus incorrectly states the holding which turns on the pleadings, and does not pass on the substantive law, but the case is not in point as to the question immediately under discussion.

In

*Stevens v. Pendleton,* 83 Mich. 342; 47 N. W. 1097,

the surety was held to be discharged because the rent-day had been intentionally and without mistake changed from the first to the last day of the month, without his consent. The court takes occasion to say that a surety on an agreement guaranteeing the payment of rent under a lease *subsequently* drawn would not be discharged if by mistake the rent day had been stated incorrectly and subsequently changed to conform to real intention of the parties. The case is of absolutely no authority here, as the facts are too dissimilar, except as affirming the general doctrine that a material change discharges a surety.

In

*New York Life Ins. Co. v. Loomis et al.*, 100 Wis. 17; 75 N. W. 421,

the original bond contained a provision under original contract, "or any future agency", and a further stipulation that bond should remain in force as long as Loomis should continue to be an agent of the company "whether " under this existing appointment, or any future one". Surety was held liable. This case cannot be regarded as any authority in the case at bar for reasons apparent.

In

*Stein v. Jones*, 18 Ill. App. 543,

surety was held on a lease which provided that no assignment could be made without consent of landlord, showing unquestionably that the lessees contemplated that assignments might be made.

In

*Western Bldg. Co. etc. v. Fitzmausice*, 7 Mo. App. 283,

there was an express provision that no changes in the plans or specifications should avoid the contract.

*Standard etc. Co. v. Stone*, 35 N. Y. App. Div. 62, is not in point.

*U. S. v. Freel*

is the most important authority on this phase of the question. That case has been referred to and digested *supra*. At this point we again call attention to the

clause, "And further provided, That no change herein " provided for shall in any manner affect the validity " of this contract", found in the contract in the *Freel* case (see 186 U. S., p. 313). No such clause, or anything of like import occurs anywhere in contract, specifications, or bond in this case.

Many cases can be found where the contract contains a provision to the effect that alterations in the plans and specifications may be made without avoiding the contract. In all such cases it is properly held that changes such as might have been contemplated will not avoid the bond. Such is the case in *People's Lumber Co. v. Gilliard*, 136 Cal. 55. The clause providing for change in contract in that case was:

" Third. Should the said Board of Trustees at any " time during the progress of said building request any " alterations, deviations, additions, or omissions from " the said contract, specifications or plans, they shall be " at liberty to do so, and the same shall in no way affect " or make void the contract, but will be added to or " deducted from the amount of said contract price, as " the case may be, by a fair and reasonable valuation."

That case cannot be regarded as authority for anything more than that, where a bond is given for the performance of a contract attached thereto and referred to, which by its terms expressly provides that changes in the plans for the building may be made without avoiding the contract, such bond is not discharged by reason of changes thus provided for in the contract.

*U. S. v. Freel* is authority for the rule that, where the original contract provides that alterations of certain classes therein specified may be made, without affecting the validity of the contract, sureties are discharged by alterations not contemplated by the original contract. It announces as law, that alterations in the contract, such as were within the contemplation of the original contract, might have been made without releasing the sureties, *since the original contract expressly so provides.* It is no authority that in the absence of a specific clause in the original contract or bond expressly providing that the same shall not be avoided by changes or alterations subsequently agreed to by the owner and the contractor, sureties are still bound if changes are made, which are such *as might* have been provided for in the original contract.

These two cases, *U. S. v. Freel,* 92 Fed. 299, and 186 U. S. 309, and *People's Lumber Co. v. Gilliard,* 136 Cal. 55, and *27 Am. & Eng. Encyc. of Law* 495, are cited for the contention that, if the original contract seems to contemplate supplemental agreements, changing it in certain respects, sureties who have signed such original contract are bound by any supplemental agreement changing the contract, made without their knowledge or consent. These two cases are clearly and certainly not in point as in both cases the original contracts provided in express terms, that no changes or alterations made by the owner and contractor, as to the details of the work, should avoid the contract. *No such clause appears anywhere in this contract, the plans and specifications, or the bond in this case.* The statement of

law in *27 Am. & Eng. Encyc.*, 495, is evidently intended to mean that *where the original contract provides that changes may be made therein without avoiding it,* sureties are not discharged by changes *made of the kind contemplated* by the parties at the time contract is made. We admit that this is the law, but it is inapplicable to the present case, for the original contract does not provide for changes. Certainly it was not in the contemplation of the parties that the time of performance should be almost doubled.

In *U. S. v. Freel,* 92 Fed. 299, will be found a very full discussion of the whole question of discharge of sureties by changes in the contract with exhaustive citation of authorities. There are formulated in the opinion of the learned court certain general rules of law on the subject. There is no such rule as that contended for by defendants in error herein, viz., "if "the alteration appears to have been within the "contemplation of the *parties* when the contract was "made" the surety is not discharged. The nearest approach to this is No. 8 of the rules, which, in the opinion of the learned court in that case, can be regarded as settled. It is:

> "If the primary contract contemplate changes in the work, either in nature or extent, similar to that stipulated in the supplemental contract, the performance whereof will be obligatory upon the contractor, the surety's consent to the secondary contract will be deemed to have been anticipated by his placing himself in the relation of surety to the original contract. (a) It is immaterial that the

> primary contract does not make the execution of the changes obligatory upon the contractor, provided it empower him to make a subsidiary contract for the performance thereof, or contemplate that he may make voluntarily such contract."

That is something very different in principle from rule urged by plaintiff. The main part of this Rule 8 has no possible application to the present case, since it applies only when the original agreement makes the performance of the subsidiary agreements *obligatory on the contractor,* which, of course, it does not in this case. The sub-rule (a) applies no more since that, read with what goes before, has reference *to a contract which in terms,* states that it may be varied by subsidiary agreements. Rule 8 applies to cases where the original contract contains a provision that changes can subsequently be made in it without violating it or rendering it void. We have examined all cases cited by the learned judge within our reach, on which it is based, and in every case the contract contains such a provision expressed, or a provision expressed by which contractor binds himself to make change if desired.

See

*Village v. Leonard,* 68 Conn. 495; 37 Atl. 397;
*De Mattos v. Jordan,* 15 Wash. 378; 46 Pac. 402;
*Northern Light Lodge v. Kennedy,* 73 N. W. 524, *infra;*
*Beers v. Wolf,* 116 Mo. 179; 22 S. W. 620, *infra;*
*Hayden v. Cook,* 34 Neb. 670; 52 N. W. 165.

The contract in the case at bar did not contemplate supplementary agreements extending the time for per-

formance, within the meaning of the rule in these cases, nor within the meaning of any rule counsel has found.

*Lodge v. Kennedy, supra,* was decided on quite another point, but the contract in that case expressly provided that changes might be made therein "and the "contract shall not be violated by such acts". The holding was that, because certain changes had been made and not in writing, as provided by the contract, the surety was discharged.

**Specifications 18, 19 and 20 Considered (Trans. 20).**

"18. UNAVOIDABLE DELAYS. When an unavoidable "accident, storm, or other act of Providence occurs, "through which the progress of the work is or seems "likely to be delayed, the contractor shall immediately "notify, in writing, the officer in charge of the occur- "rence in detail, and state in what way and to what "extent it will delay the fulfillment of his contract, in "order that the necessary investigation may be made, "and the matter put on record. And it is clearly to be "understood that, unless it be done whenever such "thing occurs, no subsequent application for an exten- "sion of time for the completion of the contract on "account of such occurrence will be recommended.

"19. AVOIDABLE DELAYS. Should the progress of the "work be delayed by anything but unforeseen and un- "avoidable accidents, storms, or other acts of Prov- "idence, or by the action of the government, no appli- "cation by the contractor for an extension of time for "the completion of his contract will be recommended "by the officer in charge, for favorable consideration,

" except on condition that the contractor make good any " deterioration caused by such delay, and bear the ad- "ditional cost of supervision and inspection by the gov- " ernment, and other expenses caused by the failure " of the contractor to fulfill his contract with the " United States according to its terms; and by granting " the extension of time asked for there shall be reim- " bursed to the United States by the contractor the " amount of such additional charges, to be deducted " from any money that may be or may become due to " him from the United States under this contract, the " difference only to be paid him upon his receipt.

" 20. AUTHORITY FOR EXTENSION OF TIME. No ex- " tension of time for the completion of the work will be " made except upon the authority of the Secretary of " the Navy."

We fail to find in these specifications anything corresponding to "no change herein provided for" "shall " in any manner affect the validity of the contract", as found in the Freel case. There is nothing in the contract in regard to changes as to time, except these specifications. Can it be said that because of these specifications sureties consented in advance to the extension made?

These three sections in the specifications, relied on by defendants in error, did not provide for extensions of time. They are in the specifications for the work, and are merely in the contract by reference. Their purpose was to give the prospective contractor an idea of the kind of work he was engaging in when making his bid,

and the character of his employer. They amount to no more than would a clause attached to an advertisement for bids, stating that the owner was very much opposed to any extension of time; but under proper circumstances might consider it provided the contractor reimbursed him for any deterioration or additional expense. The purpose of such a clause in specifications for work for which bids are invited is very clear. The bidders are informed what to expect, but not what can be insisted upon. That is all these specifications amount to. To be sure, the contract refers to the specifications, and incorporates them, but that can give the clauses no greater force than they have as real alone, for the rest of the contract is perfectly definite as to time for completion.

If the specifications and the contract proper are in conflict, the contract proper, or signed portion, must control.

*Meyer v. Berlandi*, 54 N. W. 937;
*Palladino v. New York*, 10 N. Y. Supp. 66;
*Demarest v. Haide*, 32 N. Y. Sup. Ct. 398.

The liability of a surety is never to be extended *by implication*. Yet, if we grant plaintiff's contention, here is a case where sureties, for the performance of a certain work within sixteen months, might be held for an indefinite period thereafter without a word of a binding contract to found their liability on, merely because in the specifications on which bids were made, there are certain clauses stating the government's attitude in regard to extensions of time. Supposing for

utterly unavoidable reasons the work was delayed again till the last month of the extension granted, and another extension given, and under like circumstances another, would these sureties still be bound? Instead of being sureties for sixteen months, they might be made sureties for as many years. It is unthinkable.

Contrast the contention of the government in this respect with the law as announced by Mr. Justice Field in *Reese v. United States,* 9 Wall. 14:

> Reese was surety in a recognizance conditioned that one Limantour 'should personally appear at the next regular term of the circuit court to be held in the city of San Francisco, *and at any subsequent term to be thereafter held in that city'*. At the next subsequent term of that court the district attorney moved for, and obtained, a postponement of Limantour's trial, to which postponement he assented. The court below held that in this there was no ground for exemption of the bail from liability on the recognizance; but the Supreme Court, in an opinion delivered by Mr. Justice Field, reversing the judgment, said:
>
> " 'The provision for his appearance at any subsequent term had reference to such subsequent term as might follow in regular succession in the course of business of the court. * * * The stipulation to postpone * * * was inconsistent with the condition of the recognizance. * * * The stipulation, in other words, superseded the condition of the recognizance. * * * The stipulation made without their consent or knowledge, between the principal and the government, has changed the character of the obligation. It has released him from the obligation with which they covenanted he should comply, and substituted another in its place. * * * And the law upon those matters is perfectly well settled. Any change in the contract on which they are sureties,

made by the principal parties to it without their assent, discharges them, and for obvious reasons. When the change is made they are not bound by the contract in its original form, for that has ceased to exist. They are not bound by the contract in its altered form, for to that they have never assented. Nor does it matter how trivial the change, or even that it may be of advantage to the sureties. *They have a right to stand upon the very terms of their undertaking.*' ''

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**5. IF CONTRACT CONSTRUED TO PROVIDE FOR CHANGES AS TO TIME AND OTHER POINTS, SUCH CHANGES COULD ONLY BE MADE BY AGREEMENT SIGNED BY SURETIES.**

The only provisions of the contract which touch the question of changes are as follows:

(Contract. Trans. 7.)

" And it is further agreed that if during the progress " of the work it shall be deemed, by the government, " necessary or desirable to make any changes or modi- " fications in the plans and specifications, affecting the " cost, said changes or modifications, and the increased " or diminished compensation to be paid the contractor " must be agreed to *in writing by the parties to the* " *contract* before the same is begun; and such increased " or diminished compensation based upon the actual " cost, and when exceeding $300 shall be assessed by a " board of naval officers, appointed for the purpose" (italics ours).

(Specifications. Trans. 21.)

" 22. CHANGES. Should it be to the interest of the " government to make any changes in the plans or

" specifications, exceeding $500 in value, the increased " or decreased compensation to which the contractor " may be entitled is to be determined by a board of " naval officers, and the contractor shall be bound by " their decision, and no further payments shall be made " until their decision shall be accepted by the con- " tractor, in writing. *Changes in plans or specifica- " tions, not exceeding $500 in value, may be made by " mutual agreement, in writing.*" (Italics ours.)

The sureties are parties to the contract; they are "parties of the first part", and signed the contract as parties thereto. These provisions clearly require that they shall sign the changes. So held.

*Beers v. Wolf,* 22 S. W. 620, *supra,*

was a case where it was provided in the original agreement that changes might be made therein by written supplemental agreement of the parties to the original agreement. The sureties were parties to the original agreement and the holding is that a supplemental agreement binding on them must be signed by them, and, since not so signed, sureties discharged by changes made.

*Lodge v. Kennedy,* (1897) 73 N. W. 524.

Provision in contract provided that "No alterations " shall be made in the work shown or described in the " specifications or drawings except upon the written " order of the architects, and the amount so ascertained " shall be added to or deducted from the contract " price". Specification attached to contract and made

part thereof by reference was "The I. O. O. F. shall " be at liberty to make such changes or alterations " during the construction of the building as they shall " consider necessary, and the contract shall not be " violated by such acts, but a proper allowance shall " be made in the price of contract, at the time of such " changes, either to the I. O. O. F. or to the con- " tractors, as the case may be". Alterations were made upon the orders of I. O. O. F.; not upon any "written order". *Held* sureties discharged. There is a full discussion of the principle involved, and the opinion closes as follows:

> "Under the contract for the performance of which they became sureties, their liability could be increased, but only in a specified manner. To hold them to a liability that has been increased in any other manner is to hold them 'beyond the express terms of the contract'. This cannot be done" (p. 526).
>
> "The provision of a building contract that no changes in the work should be made unless noted on the contract was for the common benefit of the owner, the contractor, and the contractor's surety, and failure by the owner to comply with such provision could not be waived by him and the principal so as not to discharge the surety on it being disregarded."

*Lonergan v. San Antonio Loan & Trust Co.*, 104 S. W. 1061.

Where the contract provides that it may be altered by written agreement of *the parties* in writing, and the sureties are not parties to the contract, then an alteration made in writing by the parties to the contract does

not discharge the sureties (*Moore v. Fountain,* 8 So. 509); but this is, of course, different from the case at bar.

To the same effect as

*Lodge v. Kennedy, supra,* see
*Eldridge v. Fahr,* 59 Mo. App. 44;
*Killoren v. Meehan,* 55 Mo. App. 427.

The requirement that the change shall be made in writing signed by the parties is of the same nature as the requirement that it shall be made in writing, and the same rule should obtain, and it was so held in *Beers v. Wolf, supra,* a well considered case.

Our position on this point is, conceding for the argument, that the contract does provide that it may be altered by extension of time of performance, it can be altered only by written agreement of the parties, and the sureties were parties. In other words, this provision clearly entitled them to notice of the proposed change before same was made. Perhaps, it may be argued, they could refuse to make a proper alteration. Even so, they were entitled to knowledge of the proposed alteration, and a chance to agree to it. They did not have one. They were discharged by change made not in accordance with terms of contract on subject of making changes therein.

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**6. THE EXTENSION WAS NOT GIVEN UNDER CONDITIONS PERMITTING SAME UNDER SPECIFICATIONS 18 AND 19.**

It does not appear that the delay was unavoidable at all, except for thirty or forty days (see letter asking

extension). There were two classes of delays mentioned in the specifications, "unavoidable" and "avoidable". The unavoidable were such as caused by "unavoidable accident, storm, or other act of Provi- "dence". The reason given by contractor for delay is "unforeseen hardness of the material and unforeseen difficulties in the execution of the work", surely not embraced in the unavoidable delays. So it does not appear that the extension was properly granted, as for an unavoidable delay. As to avoidable delays, it was stated in specification 19, that "no application by the "contractor for an extension of time for the comple- "tion of his contract will be recommended by the offi- "cer in charge, for favorable consideration, *except on "condition that the contractor make good any deteri- "oration caused by such delay, and bear the additional "cost of supervision and inspection by the government "and other expenses caused by the failure of the con- "tractor to fulfill his contract, with the United States "according to its terms;* and by the extension of time "asked for, there shall be reimbursed to the United "States by the contractor the amount of such addi- "tional charges".

It does not appear that any agreement was made by the contractor to stand the additional expense, or that the United States required that, or that the contractor did stand such expense as required. It will be noted that by the very language of the specification, it is regarded as one of the express terms of the contract that work be done within time limited.

The extension was granted not according to terms of the specifications, and this discharged the sureties; assuming for the sake of argument that they would not have been discharged by an extension granted under proper circumstances.

See

*Beers v. Wolf;*
*Lodge v. Kennedy;*
*Eldridge v. Fuhr;*
*Killoren v. Meehan, supra.*

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II.

**The Contract Was Changed by the Action of the Government in Agreeing That No Materials Should Be Deposited on Shore.**

1. The original contract was "for the construction, "completion in all respects of the dredging at said "naval station, in strict accordance with, and subject "to, all the conditions and requirements of the plans "and specifications". The specifications so far as they described the work to be done are given in full in transcript pages 8 and 9. The amount of material to be removed was estimated at one million cubic yards. The government estimated that 49,000 cubic yards, or about one-twentieth of the amount dredged, would be required to be placed on shore; but reserved the right to vary this amount to any extent. The New York Dredging Company dredged 80,418 cubic yards, and placed all of it on shore. Then on February 21, 1900, in response

to repeated requests for a modification of the contract in this respect, the government agreed that none of the material thereafter dredged need be placed on shore. This was a substantial change in the contract. The change was a substantial one and it is immaterial that it decreased the burden upon the contractor.

The preceding authorities and argument cited in the matter of the extension of time are all in point here.

The sureties did not consent to the change. If contract be held to provide for changes, it must be held that these changes could only be made in writing signed by the parties to the contract, i. e., contractor and sureties, as pointed out in regard to the change of time of performance.

Very slight changes in the requirements of contracts have been held to release the sureties.

*U. S. v. Corwinne*, Fed. Cas. 14,871:

> "The sureties upon a bond, wherein the principals bound themselves to the United States to open a ship canal 300 feet in width and 20 feet in depth, and keep it open the same width and depth for 4½ years from the time of the acceptance of the work by the secretary of war, *held* discharged from all liability on the same when the principals did not perform their agreement for opening the channel according to its terms, and the government accepted the work with the channel only 18 feet in depth, instead of 20, as required by the contract, on the ground that a surety is not bound beyond the terms of his contract, and his liability cannot be extended or enlarged by implication, and any change in terms, unless expressly assented to by him, releases him from his legal responsibility."

*U. S. v. Tillotson,* Fed. Cas. 16,524.

Sureties are discharged by change of tapia for brick and altering mode of estimating a price of labor, whether for their benefit or detriment immaterial.

*U. S. v. Case,* Fed. Cas. 14,743.

. Defendants were sued on a guarantee by them that one Van Wagenen, who was a bidder for a contract to furnish stone, which was about to be let, would, in case the contract was awarded to him, enter into the contract with sufficient sureties within ten days after acceptance; and in case of his default defendants agreed to make good the difference between his bid and the next lower, or the person to whom the contract might be awarded. The contract was awarded to Van Wagenen. He failed to execute it, and subsequently the contract was awarded to another bidder at a loss of $7290, for which the action was brought.

The specifications for bids provided, among other things, that the stone to be furnished "should be of " some good quality, approved by the engineer in " charge", and required that bidder should send a sample of the stone proposed to be furnished. Van Wagenen's bid stated that for a sample of the stone to be furnished, "I refer you for samples of stone to be " furnished under this bid, to the samples sent by me to " your office at time of former bid by me on same work, " and will agree to furnish like stone, or such stone as " the engineer in charge shall require". On the day for opening bids, the engineer in charge telegraphed to

Van Wagenen as follows: "What kind of stone and "from which quarries do you propose to furnish under "your bid today?" To which Van Wagenen replied "Limestone from following quarries: Marblehead and "Kelly's Island, Ohio; Chaumont, New York; Queens-"town, Ontario". To this the engineer replied: "If "the contract is awarded to you, you must furnish "Marblehead or Kelley Island. Chaumont will not be "accepted, and Queenstown is prohibited by law". Van Wagenen assented. *Held*,

> "The sureties were discharged as the contract agreed to be entered into by Van Wagenen was not the contract which they were sureties for."

It was held that they were sureties merely that Van Wagenen would enter into the contract called for by the specifications, and the court construed this to mean that he would furnish rock according to the sample, which should be of some good quality, and approved by the engineer, but this did not permit that the engineer should beforehand state that the rock could not come from any place whatever.

*Zeigler v. Hallahan*, 131 Fed. 205.

> "Where defendant became surety for the performance by a tenant of the covenants of a lease for 10 years, which bound the tenant to keep and pay rent for the premises, and, at the expiration of the term, deliver them in good condition, a modification of the contract before the tenant took possession, without the knowledge or consent of defendant, by the insertion of a provision that, in the event of the total or partial destruction of the premises by fire or other casualty, rendering the

same untenable, the lease from such time should become void and should be surrendered to the lessor, constituted a material alteration, which operated to discharge defendant from liability.

"In determining whether a surety is discharged by an alteration of the principal contract without his consent, the question is not whether the change was or could be prejudicial to him, but whether it affected a material alteration of the agreement to which his undertaking of suretyship related; and, if it did, he is discharged, even though the change may have been beneficial to him."

2. The original contract was for 1,000,000 cu. yds. The specification says, "This quantity is approximate " only, and may be increased or diminished as the funds " allotted for the work may allow or require" (Trans. p. 8). The amount actually dredged under both contracts was only 149,461 cubic yards. Was this approximately one million? The agreed statement of facts shows without question that the government abandoned the work. This feature is gone into at length in another part of the brief, and will not be discussed at this point.

The plaintiff in error contends that there was no alteration of the contract; and that if there was an alteration sureties cannot complain, since they could not have been injured thereby; and finally that the alteration being made after original contractor was in default, sureties cannot complain if the work was substantially finished. We shall take up these contentions in the order here stated.

Although the original contract did provide that the amount to be placed on shore could be increased or

diminished by the United States, this provision did not permit that the United States should by a binding agreement agree to accept less than what New York Dredging Company has contracted to do. In other words, while not requiring any of the material to be placed on shore could not release the sureties; contracting by the United States and New York Dredging Company, to change the work so that none could be required to be placed on shore might release the sureties. Under the original contract, the United States had the right to have the material placed on shore. United States need not have required any of it to be so placed to comply strictly with contract. But after the change in the contract, the United States did not have the right to have all the material placed on shore. To that extent the contract was changed.

We do not think it self-evident that the change in disposal of the spoil could not injure the sureties. It does not appear that the spoil could not have been more cheaply placed on shore than it could have been dumped in deep water, the other alternative. It would depend, of course, on the distance to deep water. Merely because New York Dredging Company was very anxious to get permission to deposit spoil in deep water is no reason for holding that such was obviously the cheaper method. Under the contract with P. Sanford Ross, all the spoil was to be deposited in deep water.

In *Cambridge Sav. Bk. v. Hyde,* 131 Mass. 77, relied upon by defendants in error, the alteration was an endorsement on the note that after a certain date the interest should be lower than the rate written in the note. The note was payable on demand. The rule ap-

plied to that case is inapplicable here. The note was still payable in the same medium, to-wit: money, and the remission of part of the interest could not prejudice the surety. No evidence would be required to show that the payment of a less sum was less onerous than of a greater. In the case at bar, can it be truthfully said that it is self-evident that the change could not injure the sureties? If not, then the rule does not apply. We believe, however, the true rule to be, that, if the contract is changed, the surety is discharged, even if the change should be for the benefit of the surety; or if it should be self-evident that the surety could not be injured. Such is the uniform holding of the courts of United States. We have cited the leading cases hereinbefore. In so far as the Cambridge Bank case states a contrary rule, it is against the weight of authority and unsound.

Several cases are cited wherein it is held that whenever it becomes the right of the owner to complete at expense of contractor it is not necessary that strict letter of the contract be followed. In those cases, however, the work to be done was a certain specific construction and the changes were in details of the materials or methods to be used in the construction, and it was shown that the construction was actually substantially completed as contracted for. Where that is not the case, the surety is discharged; see

*Chesapeake Transit Co. v. Walker & Son,* 158 Fed. 850;

*U. S. v. Corwinne,* Fed. Cas. No. 14871;

both already digested in this brief.

We do not think that United States has shown that the work was substantially completed, and is therefore not in position to claim the benefit of the rule stated. We do not find any answer to our contention that as the contract was one for approximately one million cubic yards, and only 149,461 cubic yards was done, substantial performance has not been shown. We shall discuss this phase of the matter more at length hereinafter.

Further, it seems to us that the very work to be done here was changed. The excavation and deposit of material dredged was not a detail of a work of construction; it was the very work of construction and this was changed. The original contract was for four items of dredging; it was a mere coincidence that the price bid by New York Dredging Company for items 1 and 3 was the same (Trans. pp. 5, 12 and 13). There were four different kinds of work to be done. After the change, and under the Ross contract, only two of the items were to be done (Trans. p. 15).

We do not concede the right of the government to recover from the contractor and sureties the expenses of the completion of the contract, had it been completed; but we claim that the government can recover only the reasonable or necessary costs of completion to show which it is necessary that it must first be shown that the work was actually done.

III.

**The United States, Having Annulled the Contract Without Reservation of Right to Complete the Work and Charge the Cost of Completion to Contract, Such Cost Cannot Be Recovered as Such, to wit, Moneys Expended.**

This is an action brought by the United States for moneys expended by it in completing a work of construction abandoned by defendant, and for a further sum as liquidated damages. The theory of the complaint, as appears from reading the whole document, together with the exhibits, is that under the terms of the contract between United States and New York Dredging Company, all sums paid by United States for completion of the contract, in excess of what would have been paid New York Dredging Company, had it finished the work, were to be repaid by New York Dredging Company to United States; and demand having been made, and payment not having been made, this action is brought for the recovery of the money thus due *under the contract.* Although actions are not required to be in any particular form under the code, yet it has been held repeatedly that every complaint must be framed on some definite theory, which once adopted in an action must be followed. In this case, the complaint sets forth the making of a contract for the performance of certain work. The contract is attached as an exhibit. The complaint proceeds, that New York Dredging Company failed to perform its part of the contract; that, then United States, availing itself of the terms of the contract, declared the same *abrogated, null and void* (Trans.

p. 2); and then made another contract for the completion of the same work, and *that* contract is attached and made an exhibit, and that the work was completed under the second contract and paid for. The terms of the first contract provide for the completion of the work at the expense of the New York Dredging Company, if the work has been delayed and certain recommendations made. The first contract also provides that deduction of fifty dollars ($50) a day may be made from the contract price for each day the work is delayed after the time set. Now the complaint sets up all these facts, the making of second contract and the payment by plaintiff of the second contract, and recovery is asked for the excess paid him. *This is not an action for damages for breach of contract,* for, if it were, most of the complaint would have been left out. The setting forth of the manner in which the second contract was made, the attaching it to the complaint as an exhibit, the specification of for what items the sum demanded, $57,338.02, was due, all taken together, show clearly that this action is *for moneys due under the terms of a contract, and not an action for damages for a breach of contract.*

Counsel for the government, in the lower court, contended that the action is one for damages for breach of contract, and that the measure of damages is the difference between amount actually paid out and the original contract price. We contend that it is clearly not merely an action for damages for breach of contract; but on either theory plaintiff fails to make out a case against the principal on the pleadings and admitted facts.

If the action be held to be one for the recovery of moneys paid out under contract, and money due as liquidated damages under the contract, the government fails, because the agreed facts show that the contract on which it bases its action was annulled without reserving the right to finish the work at the expense of New York Dredging Company. After the contract was declared null and void, the only right which the United States could exercise under it was the one expressly reserved in accordance with the provision for annulment, viz.: To recover for defaults and violations previous to the annulling of the contract. Such being the case, it is manifest that after the contract was declared void, the United States had no right to complete the work mentioned in it, at the expense of the contractor and its sureties; and if not, it cannot be entitled to recover the money paid to P. Sanford Ross for dredging work done after the contract was declared null and void.

The legal effect of annulling a contract is to put an end to all rights, obligations and liabilities thereunder, and to place the parties in the same situation, as to all matters to which it relates, as if the contract had not been entered into. We are speaking of annulment, without reservation of any kind. If, however, the annulment is without prejudice to some right under the contract of the party who exercises the power to annul, the contract continues to exist for the purpose of enabling the reserved right to be enforced, but for that purpose only.

The provision in the contract between the United States and the New York Dredging Company, under

which, on March 25, 1901, the United States declared it null and void, read as follows:

" If said parties of the first part shall fail in any re-
" spect to perform this contract on their part, it may,
" at the option of the United States, be declared null
" and void, without prejudice to the right of the United
" States to recover for defaults herein, or violations
" hereof" (Trans. p. 7).

It will be noticed that the only right which this provision permitted the United States to retain, in case the option given by it was exercised and the contract declared null and void, was the right to recover for defaults therein, or violations thereof. All other rights under the contract were extinguished by its annulment. Nor did the United States reserve any right, when it declared the contract null and void, except the one mentioned in the provision for annulment. The notice given to the New York Dredging Company and its sureties, that the option to annul had been exercised, was signed by the Chief of Bureau of Yards and Docks (Trans. p. 53), and says:

" Department of the Navy,
" Bureau of Yards and Docks,
" Washington, D. C.,
" March 25, 1901.

" Gentlemen;

" It appearing that you have failed on your part to
" perform the contract between yourselves, as parties
" of the first part, and the United States, by E. C.
" Mathews (Chief of the Bureau of Yards and Docks),
" acting under the direction of the Secretary of the

" Navy, party of the second part, dated October 25,
" 1897, for dredging at the Naval Station, Port Royal,
" South Carolina, which dredging was to have been
" completed within sixteen months from the date of
" said contract, the party of the second part, exercising
" the option reserved to them, declare said contract
" null and void, without prejudice to their right to re-
" cover for defaults therein or violations thereof."

It is beyond question, therefore, that no other right was reserved when the United States exercised the option to declare the contract null and void, than to recover for the defaults and violations, if any which had theretofore occurred.

But the United States does not seek to recover in this action for the defaults or violations mentioned in the provision for annulment. The recovery sought, other than for the liquidated damages claimed to be due, is based upon the assumption that the United States had, after the contract was declared null and void, the right to complete, at the expense of the contractor and its sureties, the work embraced in the annulled contract, or, in other words, the right to complete the work, and, if the cost of doing so exceeded the price agreed to be paid for it by the United States, the right to recover from the contractor and its sureties the amount by which the expenses of completing the work exceeded the contract price. That right, however, was not reserved by the United States, when it declared the contract null and void, and like all other rights thereunder, except the reserved right to recover for defaults or violations

of the contract, ceased to exist when the annulment took place. The annulment of the contract, without reservation of the right to complete the work mentioned in it, at the expense of the New York Dredging Company and its sureties, presents, we submit, an insuperable obstacle to the recovery by the United States from the New York Dredging Company of any part of the amount paid to P. Sanford Ross for dredging done under a contract entered into by him with the United States, on May 21, 1901, which was nearly two months after the contract between the United States and the New York Dredging Company had been declared to be null and void.

To support the complaint in the lower court, the contention of the government was that specification 17 clearly gave the right to annul the contract and complete by other means, and recover the amount paid for such completion.

Specification 17 (Trans. p. 10) is as follows:

"17. PROGRESS OF WORK. If at the close of any "working month the progress of the work shall not "have been such as to indicate that it will be completed "within the time specified in the contract, the govern- "ment may refer the matter to a board of three officers, "and if recommended by them, and the interests of the "government so require, annul the contract and com- "plete the work in such manner as it deems best, at the "expense of the contractor and his sureties."

When a contract proper and specifications attached thereto are in conflict, the contract proper, or signed portion of the whole, governs. This is familiar law.

See:

*Meyer v. Berlandi,* Minn. 1893; 54 N. W. 937; 53 Minn. 59;

*Palladino v. City of New York,* N. Y. 1890; 10 N. Y. Supp. 66;

*Demarest v. Haide,* N. Y. 1885; 52 N. Y. Sup. Ct. 398.

The reasons for this rule are apparent. In the case of *Meyer v. Berlandi* (supra), the contract and the plans and specifications referred to therein and made a part thereof, were inconsistent as to the method for paying for extras furnished by the builder. The method provided by the contract was upheld. The opinion is by Chief Justice Gilfillan, and the portion in question reads as follows:

> "These provisions are inconsistent, because they designate different and inconsistent modes of deciding on the same matters; and the question is, which shall prevail? We think the provisions in the contract itself ought to prevail, because it is to be presumed the plans and specifications were prepared first, and that what the parties set down in the contract is the last expression of what their minds settled down to on the matter; and also because, it being matter of contract, the natural place for it, and where one would naturally look for it, is in the contract and not in the specifications." (54 N. W. p. 937.)

The two clauses in question in the case at bar touch a matter which is properly covered by the contract

proper, annulment of the contract and recovery against the contractor. Following the rule in cases of this kind, the provision in the contract proper should be held to govern. But the very language of specification seventeen (17) shows that it was not under that clause that contract was annulled. Specification seventeen (17), by its terms, is to apply "If at the close of any working "month the progress of the work shall not have been "such as to indicate that it will be completed within "the time specified in the contract". The time specified in the contract for the completion of the work, as extended, was December 30, 1899. On March 25, 1901, or fifteen (15) months after that date, the contract was declared to be abrogated, null and void, on the report of a board of officers appointed a week previous. How can it be seriously contended that this was done under specification seventeen (17)?

When this contract was abrogated, New York Dredging Company was already in default; it had failed to perform within the time the United States declared the contract null and void, reserving the right to recover for defaults therein or violations thereof, as provided in the contract.

If specification seventeen (17) is held to be consistent with the provision of the contract proper on the subject, it must be taken only to be effective to allow the government the right to annul the contract before an actual breach. The contract proper not having provided for such a contingency, it may be contended that it was proper that a specification providing for abrogation even if there had been no actual breach, if it

was apparent that there would be default, should have been adopted as part of the contract. *But this clause providing for completion by government at expense of contractor, cannot be invoked for an annulment made long after the time for completion was past.* It is conceivable, nay, it is probable, that had this contract been annulled and the work completed by the government as soon as it became apparent that it would be delayed beyond the time fixed, the cost would have been much less than that incurred when contract was not taken up till years after. The *contract proper* has provided for the recovery for *defaults* or *violations,* and it must govern.

It appears conclusively from the letter of the government dated March 25, 1901, notifying defendant of the annulment of the contract, that the government had acted under the clause in the contract proper. The letter, which appears in full in the agreed statement, states, "it appearing that you have failed on your part " to perform the contract; the party of the second part, " exercising the option reserved to them, declare said "contract null and void, without prejudice to their right " to recover for defaults therein or violation thereof". It follows the very language of the clause in question in the contract proper, and shows the construction put upon the contract by the government at that time. The words "null and void" are given as synonyms by Webster and are thus defined: "Null, of no legal force or " effect; void, nugatory, useless"; and "Void, of no " legal force or effect; incapable of confirmation or " ratification; null". It is again respectfully urged that

the effect of annulling a contract, or declaring it null and void, is to put an end to all rights, obligations and liabilities thereunder, and to place the parties in the same situation, as to all matters to which it relates, as if the contract had not been entered into.

We may admit here (for the sake of the argument of this point) that while the contract between the New York Dredging Company and the United States was in force prior to the date for the completion of the work, the United States had the right under it to complete the work in such manner as it saw fit, in case it was apparent that the New York Dredging Company was not going to get the work completed by date set, after referring the matter to the board of officers in accordance with section seventeen (17) of the specifications, and could recover from the New York Dredging Company the amount it paid out for such completion of the unfinished contract, if it reserved such right when it annulled the contract. But this right would cease, by the very nature of the case, when the date for completion arrived.

Here was a contract for the dredging of the channel of a river to a certain depth or according to plan. The amount to be removed was uncertain and could be stated only approximately. The compensation was to be so much per cubic yard removed. A certain per cent of the pay was reserved for security of the government. The parties agreed that if default was made by contractor, or if he delayed work too much, contract might be canceled and certain rights reserved to the injured party. The parties might have agreed merely that con-

tract would be canceled. Had they done so, it is clear that there could have been no recovery. Such is frequently the case; the loss of the prospective profit on the job being regarded as sufficient penalty for breach by the contractor. The right of the government to terminate the contract and complete work at contractor's expense, before a breach thereof provided for by section seventeen (17) of the specifications, might have been exercised at any time when the proper conditions existed, *and then the government might have decided not to finish the work at all. In such case clearly there could have been no recovery against the New York Dredging Company.* All rights of the parties would have been extinguished. In the case at bar, all rights of the parties were extinguished, except the right of the government to recover for defaults or violations on part of New York Dredging Company. The payment made by the United States to P. Sanford Ross were not "defaults or violations" of the contract of New York Dredging Company, hence cannot be recovered back as such.

It is not the law, that, independently of provisions in the contract, the amount paid to subsequent contractors by the owner to complete a work of construction wrongfully abandoned by first contractor, can be recovered *as such* (moneys expended) from the first contractor. The owner can recover his damages for the breach of contract, and he can show them, by showing what he paid to finish the work, and that the amount paid was reasonable, but he does not recover for moneys expended on account of the original contractor. He can recover only the reasonable cost of completing the work in any

event. What he paid out is evidence of that, perhaps. But such owner is not without remedy. This feature of the case is gone into at length elsewhere in this brief, and is touched upon here merely to correct a possible mistake as to our position as to the annulment without reservation. *We do not at all contend that the annulling of the contract deprived the government of the right to recover damages for the breach by defendant;* but we do urge that the right to recover directly for moneys paid out to finish the work was lost, because that was a right which existed only by virtue of the terms of the contract.

We do not believe that the last paragraph of the letter annulling the contract reserved the right to complete the work in such manner as the government saw fit, and recovering from the original contractor and sureties. Specification 17 has been quoted and discussed at length, and we think that we show conclusively that it provided only for annulment before the date for completion had arrived, if it have any force as against the provision for annulment found in the signed portion of the contract. The annulment was made under the provision which gave the government the right to annul without prejudice to its right to recover for defaults or violations of the contract, as shown by language of the letter. We insist that after the annulment, no right could be claimed by the United States to complete the work in any manner it saw fit, and recover the expense of completion, as such, to wit: moneys expended. The difference between recovery sought on the express terms of a contract and

recovery of damages for breach of contract is pointed out in two cases cited by plaintiffs in error in the Court of Appeals.

*City of Lowell v. Allen*, 96 Mass. 130:

The contract gave the city the right, if the contractor did not supply the proper material when required, to "supply the deficiency in such manner as the said com-"mittee may deem expedient", and recover excessive cost, if any, from contractor. *Held*, the ordinary measure of damages for breach of contract immaterial, as the action was on the contract, and the recovery was provided in the contract.

*Quinn v. U. S.*, 99 U. S. 30:

The contract provision was:

"It was also agreed that if, in any event, the con-"tractor shall delay, or be unable to proceed with "the work in accordance with its terms, the engineer "officer in charge shall have full right and author-"ity to take away the contract, and employ others to "complete the work, deducting the expenses from any "money that may be due and owing him, and the con-"tractor will be responsible for any damages caused "to others by his delay or non-compliance."

The work was completed by United States at a less price than Quinn was to have received. Quinn sought to recover the 10% reserved on his contract and the saving made by the United States on reletting work.

"It seems very doubtful if, in the event of the termination of his contract under the clause authorizing the engineer to do so, the contractor is liable to the United States for anything beyond the ten per cent retained. This ten per cent is retained, in the language of the contract, until the whole shall be completed. It is retained as security for that end. The work is to be completed by others, and the expenses deducted from any money that may be due him. He is to be responsible for damages caused to others by the delay. If, therefore, he is responsible to the United States beyond the sum due him at the time the contract is taken from him, *it is not by the express terms of the contract, but on the general doctrine of damages on failure to fulfill any contract.*"

We cite this case merely to illustrate our contention that the recovery for a breach of contract, and the recovery of sums expended under a contract are not one and the same thing. The court in the Quinn case intimates that possibly Quinn was liable to United States *for breach of contract,* in addition to having United States deduct from the balance due him the excessive cost, if any, of the cost of the work, as provided by contract.

The defendants in error cite three federal cases wherein the contract was completed by one party who sued to recover the expenses of completion to be repaid as provided by the contract:

*Duplan v. Spencer,* 115 Fed. 689;
*Day v. U. S.,* 87 Fed. 125;
*Geo. A. Fuller Co. v. Doyle,* 87 Fed. 687.

In none of these cases does it appear that the contract was annulled. We submit that the case of an owner

who takes possession and completes the work by a new contract, as he is permitted under the contract on default of the original contractor, is not the same as that of an owner who annuls the original contract and sues for damages for breach of contract. The United States in this suit is in the latter case, because if it ever had the right to take possession and complete the work by another contract, it lost such right by the annulment, for the annulment was without reservation of that right. In the latter case the owner has only the right which exists by law to recover for breach of contract. He may show the cost of completion as evidence of the damages, but the damages are not what he expended, but what was the reasonable or necessary cost of completion. The right to complete the work and charge the cost to the original contractor is lost because that existed only under a contract which is annulled without reservation of that right.

If the court should be of the opinion that no annulment was necessary, our point would be the same. Specification 17, which alone purported to give the right to complete at the expense of original contractor and sureties, could have no application after the time set for completion had arrived.

## IV.

## Viewing Action as for Damages for Breach of Contract, United States Has Failed to Show Amount of Damages.

The Circuit Court viewed the action as one for breach of contract, and recovery was allowed on that theory. Counsel for the government maintained that the action was for damages for breach of contract.

> "Where an action is for damages which are uncertain or have not been admitted, the burden of *establishing the amount thereof* and that they resulted from the act of the defendant is upon the plaintiff." (Italics ours.)
>
> *13 Cyc.*, 192.

> "Where there is a breach of contract to perform a specific piece of work or service, the plaintiff is entitled to recover what it would *reasonably cost to perform the same*, or what it would reasonably cost the plaintiff to restore the property to its original condition." (Italics ours.)
>
> *13 Cyc.*, 162.

> "In actions for the breach of a contract, in order to enable the plaintiff to recover more than nominal damages, the actual loss sustained must be shown by competent evidence and with *reasonable certainty.*" (Italics ours.)
>
> *8 Am. & Eng. Encyc.*, 556.

See

*Insley v. Shepard*, 31 Fed. 869;

*Goldsboro v. Moffitt*, 49 Fed. 273, reversed 52 Fed. 560;

*Stillwell etc. Co. v. Phlelph,* 130 U. S. 520;
*Von Dorn v. Mengedoht,* 59 N. W. 800;
*Savage v. Glenn,* 10 Ore. 440;
*Anderson v. Nordstrum,* 61 N. W. 1132.

If this be an action then for damages for breach of contract, the United States would be entitled to recover the difference between what New York Dredging Company agreed to perform the work for, and what was the *reasonable* or *necessary* cost of completion. The rule is not the difference between contract cost and the actual cost; but the difference between contract cost and the *reasonable* cost or *necessary* cost. This distinction is pointed out in the following cases:

*State v. Ingram,* 27 No. Car. (5 Ired.) 441,

where a contractor for keeping a public bridge in repair commits a breach of his contract, and the County Court has caused the necessary repairs to be made, the rule of damages, in an action for the breach, is the value of the repairs needed, and not the sum the county might have spent for them.

*Cincinnati etc. Ry. Co. v. Carthage,* 35 Ohio St. 631,

where a railroad company agrees to grade and gravel a street, in case of breach by the company, the measure of damages is the reasonable cost of doing or completing the work.

*Fletcher v. Milburn Mfg.,* 35 Mo. App. 321,

where plaintiff, who has contracted to do work on certain personal property of defendants, fails to perform

completely, defendants may consent that he be paid what his work was actually worth, but in an action for work and labor, the extent of defendant's recoupment is the reasonable value of completing the work, and not what they actually paid to complete it.

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**1. BUT IT HAS NOT BEEN SHOWN HERE WHETHER OR NOT THE UNITED STATES EVER COMPLETED THIS WORK OF CONSTRUCTION.**

The contract of New York Dredging Company was to furnish and deliver the necessary labor and material for the construction and completion of the dredging at Port Royal Naval Station in accordance with certain plans and specifications attached to the contract. By these plans it was provided, that *"The channel of the "Beaufort River shall be increased in width and depth "by dredging so as to form a deep water basin op- "posite the station." "The area shall be dredged "to a depth of 30 feet below mean low water".* The New York Dredging Company was to be paid for 4 different items; 2 kinds of material, and 2 means of disposal. The New York Dredging Company contract was to perform and complete the work of dredging at rate of 15 cents per cu. yd. for items 1 and 3 and 99 cents per cu. yd. for items 2 and 4 (Trans. pp. 6 and 12).

A contract was made by the United States and P. Sanford Ross whereby P. Sanford Ross was to "pro- "vide, furnish and deliver at his own risk and expense, "at the United States Naval Station, Port Royal, South

" Carolina, all the necessary materials, labor, tools, and " appliances for the completion in all respects, of " dredging and removing seventy thousand cubic yards, " more or less, of material from the waters of said " Naval Station, and will complete the same within 15 "calendar months from the date of this contract in " strict accordance with, and subject to, all the condi- " tions and requirements of the plans and specifications " appended hereto, and forming part of this contract, " for the sum of one dollar and twenty-five cents per " cubic yard, the work to be done being that contem- " plated in items 3 and 4 of paragraph 32 of said spe- " cifications" (Trans. p. 22). The specifications attached to the Ross contract provided:

"SPECIFICATION No. 1144 (Trans. p. 17),

" for the completion of dredging at the United States " Naval Station, Port Royal, S. C., under appropriation " ' Naval Station, Port Royal, S. C., dredging channel " opposite station'. Act approved June 10, 1896.

GENERAL CONDITIONS (Trans. p. 17).

" 1. INTENTION. It is the declared and acknowledged " intention and meaning to secure the completion of the " work of dredging a channel opposite the Naval Sta- " tion, Port Royal, S. C., according to plans and spe- " cifications which were attached to and formed a part " of a contract between the New York Dredging Com- " pany, by Geo. W. Catt, President, of New York, N. Y., " as principal, and John McMullen and R. Percy Wright, " both of the City and County of San Francisco, State " of California, as sureties, parties of the first part,

" and the United States, by E. O. Mathews, Chief of the " Bureau of Yards and Docks, acting under the di- " rection of the Secretary of the Navy, party of the " second part, said contract having been declared for- " feited. Copies of the plans and specifications and " further information, if desired, can be obtained upon " application to the Commandant, Naval Station, Port " Royal, S. C.

"2. WORK COMPLETED. Under the terms of the " aforesaid contract there were removed from the chan- " nel, 25,887 cubic yards of material classed as earth, " and 54,531 cubic yards of material classed as rock, " all of which was deposited on the station.

" 3. APPROPRIATION AVAILABLE. The balance of the " appropriation available for continuing the work is " $87,982.20. The work will be carried on under the " new contract until the balance stated is exhausted by " payments to the contractor and government inspectors " on the work.

" 4. PROPOSALS, CONTRACT, ETC. Following is a re- " print of the specifications above referred to, the terms " of which will govern, except as herein otherwise stat- " ed, in making and receiving proposals, executing con- " tract, carrying on work, including, among other things, " time of commencement of work, extension of time, " damages for delay, measurements, etc.

" 5. TIME FOR COMPLETION. The time for the com- " pletion of the work shall be fifteen months from the " date of the contract."

To these specifications were attached a true verbatim copy of the specifications attached to the New York Dredging Company contract (Trans. pp. 17 et seq.).

*It does not appear that the United States has ever completed the work contracted to be done by New York Dredging Company. It does not appear whether or not the channel of the Beaufort River was increased in width and depth by dredging, so as to form a deep water channel opposite the station. It does not appear whether or not the area marked by the chart was dredged to a depth of 30 feet below mean low water.*

The Ross contract was made in furtherance to a bid submitted by Ross in answer to an advertisement calling for bids "for dredging at the Naval Station, Port Royal, S. C., appropriation to be expended $87,000" (Trans. p. 16), according to certain specifications which were the same as those afterwards attached to the Ross contract (Trans. p. 17). The specifications, to be sure, according to their title, purported to be for "the completion of dredging", and in paragraph 1, it is declared to be the intention of the government to secure the completion of the work of dredging a channel according to the specifications of the contract with New York Dredging Company (Trans. p. 17). But the *Ross contract was to dredge and remove 70,000 cu. yds. and Ross' bid was to remove 70,000 cu. yds. from the waters of the Naval Station.* The specifications of the New York Dredging Company contract were to be followed *except wherein they had been changed by the new contract and new specifications.* The changes were that the new contract was to dredge 70,000 cu. yds., *regardless of depth of*

*area dredged and regardless of whether Beaufort River was increased in width and depth so as to form a deep water basin opposite the station.*

It may be that by completion of the Ross contract the area marked for dredging was dredged to a depth exceeding 30 feet, and this is not improbable, as the drawing made in November, 1900, apparently attached to the Ross contract (Trans. p. 22) shows that immediately opposite to the dry dock, the depth of the channel was then in many places in excess of 30 feet deep and was approximately that deep all over the part which had been worked. Manifestly it could not be regarded as merely a completion of the original contract, if such was the case. The original contractor and sureties surely could not be liable in damages for anything except the difference in the costs of *doing the same work* under the original contract and under the Ross contract.

To put this point in another light, it may be stated thus, there is nothing in the record showing that the work contemplated by the original contract was ever substantially completed, or what the cost of substantial completion was, it being only shown that another contract was made for dredging 70,000 cu. yds. at the lowest price obtainable by the United States for the expenditure of $87,000, secured in the proper manner by advertising, exhausted the funds available for the work. It is not shown even that the excavation of these 70,000 cu. yds. did not increase the depth of the area to be dredged more than to 30 feet below mean low water; the work contemplated by the original contract. And we submit it is not unreasonable to suppose that it did.

It will be noticed in this connection that by their answer the defendants in error, at paragraph 3, deny that the Secretary of the Navy did advertise for bids *to complete the work of dredging which New York Dredging Company failed to perform* (Trans. p. 26), and also, in paragraph 4, deny that by the Ross contract, "said P. Sanford Ross was to perform certain " work, labor or services in said work of dredging; " which said work was left uncompleted by said New " York Dredging Company" (Trans. p. 26), and, also, in paragraph 7, deny that United States have been damaged in the sum of $57,338.22; and further deny "that " said sum or any other sum of money represents the " difference between what the defendant, New York " Dredging Company, agreed to perform the work of " dredging for, and what it actually cost the plaintiffs " to complete said work under the contract with P. San- " ford Ross, or in any other way" (Trans. p. 26).

In the answer of New York Dredging Company, similar denials are made in paragraphs 3 and 4 (Trans. p. 28), and further it is alleged in paragraph 5, "that no " certain or definite quantity of work, labor or services " in said work of dredging was ever fixed or deter- " mined by the United States Navy Department or re- " quired by said department to be performed by said " defendant, New York Dredging Company, under or " pursuant to the contract, plans or specifications re- " ferred to in the complaint herein and marked Exhibit " 'C'."

It is stipulated and agreed and found as facts, Trans. p. 39, findings XVI and XVII, that after the abrogation

of the old dredging company contract, the Navy Department advertised for bids according to a copy of the advertisement set forth, and that P. Sanford Ross entered into a contract in response to the advertisement; that his contract is set forth in the complaint, and that he performed all of the covenants and conditions of his contract agreed by him to be performed, and that he removed 69,043.09 cu. yds. at a price of $1.25 per cu. yd., and that the government paid therefor $86,304.87; and that had the number of cubic yards excavated by Ross been paid for at the rate provided in the New York Dredging Company contract, the total paid by the government for work done at Port Royal would have been $25,588.02 less than the amount the government actually paid.

*But it is nowhere stipulated or agreed or found as a fact that the work for which the government contracted to be done with Ross, and which was done by Ross, was the completion of the New York Dredging Company contract.* It is only admitted that the work contracted to be done by Ross was done by him. The allegations of the complaint are to the same effect.

Cases similar to this are:

*Chesapeake Transit Co. v. Walker & Son*, 158 Fed. 850.

Plaintiff, a railroad company, contracted for the construction of a line of road, and defendant became surety on the contractor's bond. The contract was for a lump sum, and the contractor failed wholly to perform, whereupon plaintiff entered into a contract with an-

other for the construction of the road which differed from the first, inter alia, in that under the first the road was to be a steam road only, while under the second it was to be equipped for both steam and electricity; the specifications of the two contracts differed materially as well as the time given for completion of the work, and the method and means of payment differed so largely that they could not well be compared. *Held,* that such differences were material, and their effect was the same as though they had been introduced into the original contract without defendant's consent, and released him from liability.

The surety on a contract for the construction of a railroad for a lump sum, which contract the principal wholly failed to perform, is discharged from liability by the making of a new contract by the railroad company with another contractor, which, as a whole, differed materially from that on which the surety was bound.

*U. S. v. Corwinne,* Fed. Cas. 14,871.

"The sureties upon a bond, wherein the principals bound themselves to the United States to open a ship canal 300 feet in width and 20 feet in depth, and keep it open the same width and depth for 4½ years from the time of the acceptance of the work by the Secretary of War, *held* discharged from all liability on the same when the principals did not perform their agreement for opening the channel according to its terms, and the government accepted the work with the channel only 18 feet in depth, instead of 20, as required by the contract, on the ground that a surety is not bound beyond the terms of his contract, and his liability cannot be extended

or enlarged by implication, and any change in terms, unless expressly assented to by him, releases him from his legal responsibility."

*U. S. v. Case,* Fed. Cas. 14,743.

Defendants were sued on a guarantee by them that one Van Wagenen, who was a bidder for a contract to furnish stone, which was about to be let, would, in case the contract was awarded to him, enter into the contract with sufficient sureties within ten days after acceptance; and in case of his default defendants agreed to make good the difference between his bid and the next lower, or the person to whom the contract might be awarded. The contract was awarded to Van Wagenen. He failed to execute it, and subsequently the contract was awarded to another bidder at a loss of $7290, for which the action was brought.

The specifications for bids provided, among other things, that the stone to be furnished "should be of " some good quality, approved by the engineer in " charge", and required that debtor should send a sample of the stone proposed to be furnished. Van Wagenen's bid stated that for a sample of the stone to be furnished "I refer you for samples to stone to be fur- " nished under this bid, to the samples sent by me to " your office at time of former bid by me on same work, " and will agree to furnish like stone or such stone as " the engineer in charge shall require." On the day for opening bids, the engineer in charge telegraphed to Van Wagenen as follows: "What kind of stone and from " which quarries do you propose to furnish under your " bid today?" to which Van Wagenen replied, "Lime-

" stone from following quarries: Marblehead and Kel-
" ley's Island, Ohio; Chaumont, New York; Queens-
" town, Ontario." To this the engineer replied, "If the
" contract is awarded you you must furnish Marble-
" head or Kelly Island. Chaumont will not be accepted,
" and Queenstown is prohibited by law". Van Wage-
nen assented. Held,

> "The sureties were discharged as the contract agreed to be entered into by Van Wagenen was not the contract which they were sureties for."

It was held that they were sureties merely that Van Wagenen would enter into the contract called for by the specifications, and the court construed this to mean that he would furnish rock according to the sample, which should be of some good quality, and approved by the engineer, but this did not permit that the engineer should beforehand state that the rock could not come from any place whatever.

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**2. IT CANNOT BE SAID THAT BECAUSE ROSS'S BID WAS THE LOWEST OBTAINABLE BY THE ADVERTISEMENT MADE THAT IT WAS REASONABLE FOR THE COMPLETION OF THE WORK UNDER THE NEW YORK DREDGING COMPANY CONTRACT, FOR IT WAS NOT A BID TO DO THE SAME OR SUBSTANTIALLY THE SAME WORK.**

The advertisement for the Ross contract stated that $87,000 was to be expended. Had that advertisement been for the completion of the work left unfinished, the bids submitted might have been lower.

The work of dredging, when the New York Dredging Company undertook it, was the dredging of approximate-

ly 1,000,000 cubic yards. Naturally New York Dredging Company could afford to do this work at a lower price per yard than they could have a much smaller quantity, for the initial expenses for dredgers, plant and preliminary work would form a much smaller proportionate cost of excavation.

But the United States determines to have a much smaller work done, and naturally the bids for this smaller work are much higher per yard. There is no way of exactly determining from the agreed statement how much more excavation could have been done at the price charged by New York Dredging Company, but it is apparent that in any case the United States would not have completed anything like one million—or half a million—or a quarter million cubic yards. New York Dredging Company had no means of ascertaining when the quantity might be decreased, or, in fact, when the work might be ordered to be stopped absolutely.

How can United States claim to have completed this contract? Had the million cubic yards been done, it is not improbable—in fact, it is very probable—that a price as low, or lower, than New York Dredging Company's price could have been secured, because the New York Dredging Company had already placed on shore, at the time they quit work, nearly twice as much as was required by the original specifications, and the government had agreed not to require that any more should be placed on shore. Furthermore, the dredging done by New York Dredging Company was almost all rock, and it is not improbable that if a million cubic yards had been ex-

cavated, the rest would have been mud or soft clay, as apparently the officers before letting the contract had decided that such would be the material excavated.

Of course, the price per cubic yard for doing only 70,000 cubic yards of dredging was higher than the price per cubic yard for doing a million, and we fail to see on what theory it can be held that because Ross' bid for doing 70,000 cubic yards was $1.25 per yard, it was a reasonable bid to do the work of construction contracted for by New York Dredging Company.

Plaintiffs in error are apparently satisfied with the rule for the measure of damages as we have stated, viz.: the difference between the reasonable or necessary cost of completion and the contract cost. They contend, however, that the contract permitted completion in any proper manner, and recovery of the amount expended. We have pointed out that such was not the case; that the contract was annulled and this action can be maintained, if at all, as one for damages for breach of contract of construction.

To show the damages it was neecessary to show that work was completed and what was paid and that it was reasonable. We find no attempt to answer our contention that it was not shown whether or not the work was completed. Unless the work was completed by the Ross contract, it is surely immaterial that the contract with him was regularly made, and is presumed *prima facie* the reasonable cost of doing that work, i. e., the work done by Ross.

In *City of Goldsboro v. Moffitt,* 49 Fed. 213, the "city "again advertised for bids *for precisely the same*

*work.*" In the case at bar the United States did not advertise for bids *for precisely the same work.* The original advertisement was for bids for approximately 1,000,000 cu. yds. and to make a deep water basin opposite the station in the channel of Beaufort River, to the depth of 30 feet. The second advertisement was to expend $87,000 in dredging at Port Royal.

Similarly in *New York v. Second Ave. Ry. Co.,* 55 Am. Rep. 839, the city expended the sum in doing *the same work.*

In *Kidd v. McCormick,* 83 N. Y. 391, it is said that testimony of the amount actually expended is completed to prove the difference between the value of uncompleted and completed house—the damages in case of non-completion. Very true; but the amount expended in completing the building so as to make a barn of it would not be. The plaintiff must show that the work done was substantially that contracted for, or the presumption does not exist.

We do not think that the mere showing that Ross' bid was $1.25 for doing 70,000 cu. yds. and putting it into deep water was even *prima facie* evidence of the reasonable cost of completing the original contract, which was for something very different, and for a much larger quantity. In *Brown v. U. S.,* 152 Fed. 964, as counsel for plaintiffs in error properly admit, the original advertisement was not for any certain work at all, but only for so much stone in place as would exhaust $45,000, the amount dependent altogether on the price bid. The original bidder, Frey, failed to enter into the

contract. Then the United States advertised again *precisely* the same advertisement for precisely the same work. The lowest bid received was accepted and the appropriation expended. The sureties were sued for the damages which court stated to be the

> "difference at the price fixed in Frey's proposal, between the quantity of stone which he promised to deliver, and the quantity which the government was able to obtain by the Conkling contract".

If the United States had completed the work contracted to be done by New York Dredging Company, and, in this action for damages for breach of contract, had shown the amount expended in such completion, we admit that *prima facie* such would be the reasonable cost of completion. But we contend that when the work is not finished the amount subsequently expended by the owner on another contract not for the same work is not *prima facie* the damages, for breach of the first contract. Such is the case at bar.

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V.

**The Contract With New York Dredging Company Was Unenforcible Against It for Uncertainty and Want of Mutuality.**

> "In order to constitute a valid verbal or written contract, the subject matter of the agreement must be expressed by the parties in such terms that it can be ascertained to a reasonable degree of certainty."
>
> *7 Am. & Eng. Encyc.*, p. 116.

"If an agreement is so uncertain and ambiguous that the court is unable to collect from it the purpose intended, the court cannot enforce it, and since there is no obligation there is no contract."

*9 Cyc.*, 248.

"A contract which furnishes no criterion whereby the amount of damages recoverable on a breach thereof can be ascertained is void for uncertainty."

*Pulliam v. Schimpf*, 19 So. 428;

*Davie v. Lumberman's Min. Co.*, 53 N. W. 625.

The essential part of the contract of New York Dredging Company with United States has been set forth hereinbefore. Let us examine it to see what was its object, and the resulting rights and liabilities (Trans. pp. 6 et seq.).

The contract provided that the contractor should provide, furnish and deliver, within 16 months, the necessary materials and labor for the construction and completion in all respects of the dredging at the Naval Station, in accordance with the plans and specifications, and that United States should pay it 15 cents per cu. yd. for items 1 and 3, and 99 cents for items 2 and 4 (Trans. p. 7).

The dredging to be done according to the specifications was as follows: "The channel of the Beaufort " River shall be increased in depth and *width* so as to " form a deep water basin opposite the station" (Trans. p. 8). "The amount of material to be removed is esti- " mated at about 1,000,000 cu. yds. This quantity is " approximate only, and *may be increased or diminished*

"*as the funds allotted for the work may allow or re-*
"*quire*" (Trans. p. 8). Drawings "comprise a chart
" of the river *showing the area to be dredged,* and a
" plan of the station showing points where a part of the
" material removed shall be deposited. *The points and*
" *the quantity may be changed. The limits of the dredg-*
" *ing may also be changed, all by the government*"
(Trans. p. 9). "The area shall be dredged to a depth
" of 30 feet below mean low water." "The channel to
" dry dock between wing dams, about 90 by 130 feet,
" shall be dredged to a depth of 22 *(or more)* feet below
" mean low water, if required" (Trans. p. 9) "The
" quantity required to be deposited on the station is
" about 49,000 cu. yds., *but the government reserves the*
" *right to increase or decrease this amount to any ex-*
" *tent*" (Trans. p. 9).

The New York Dredging Company agreed to complete the work of dredging outlined as above in 16 months, Was the contract to dredge one million cubic yards only? By the express terms of the contract the *government could increase the quantity as the funds allotted for the work allowed.*

Was the contract to dredge the Beaufort River according to the drawings? *The limits of the dredging could be changed by United States by changing the area marked.* The channel to the dry-dock between the wing-dams, about 90 by 130 feet, was to be dredged to a depth of 22 feet, *or more,* below mean low water. *There was nothing whatever in the contract designating what work was to be completed in 16 calendar months.*

"That is certain which can be made certain." But how could this contract be made certain? The government could increase or decrease the amount to be dredged *to any extent* as the funds permitted or required. The river could be increased in width indefinitely accordingly as the area marked for dredging was changed by United States, as the United States had a right to change it.

The only definite thing about this contract was the price per cubic yard to be paid for each cubic yard dredged. It does not appear anywhere what was the amount of the funds originally available for this work. Supposing the original fund had been only $53,985.59. Then the dredging must necessarily have stopped with the amount dredged by New York Dredging Company. But because there happened to be left $87,000 unexpended, can it be said that the damages for refusal of New York Dredging Company to dredge more was the difference between the cost of dredging the number of cubic yards at the price the work was being done by New York Dredging Company, and the best price obtainable by bids for the expenditure of $87,000? In other words, the United States must take the position that it had the right to expend any sum it saw fit in dredging at Port Royal and charge the New York Dredging Company for the difference per cubic yard between the best bids obtainable and 15 cents and 99 cents per yard. There was nothing to prevent the United States from spending $1,000,000 more on dredging at Port Royal. The area could be increased, the

channel could be widened, the river could be dredged further and further up its course, and the channel to dry dock deepened indefinitely. It is all so provided in the contract. Could the New York Dredging Company still be bound to pay damages?

This contract was drawn up by the United States and was evidently so framed that in case the appropriation for the work was cut off, the United States would not be liable in damages. In every specification touching the work, it is provided that the amount may be varied by the government. *The contract must be construed most strongly against the author.* The language of the specifications is that of the United States.

We have not been able to find any case exactly like this, but the following are instructive:

*Pulliam v. Schimpf,* (Alabama, 1896) 19 So. 428:

> "A contract under which plaintiff agreed to establish and maintain a shooting gallery in a house furnished by defendant, the net profits of which business were to be divided between them, and the business to continue so long as it was profitable or paid expenses, does not, on account of its uncertainty, furnish a cause of action which will support a judgment for damages in case of a breach thereof by defendant, by terminating such business.
>
> "A contract which furnishes no criterion whereby the amount of damages recoverable on a breach thereof can be ascertained is void for uncertainty."

The court says, in regard to the uncertainty as to damages:

> "By its terms the business was to continue so long as the business paid expenses, or was profit-

able. If the business should, so long, prove either profitable, or merely sufficient to pay expenses, both parties were, if the agreement is valid, bound to keep it going, without limit. The defendant was bound, for a lifetime, to furnish his house for carrying on the business, though he may receive but a farthing of profit as compensation for its use, or though he receive nothing at all, if the business proved sufficient to pay the expenses of its operation. Not only this, but he imposed a perpetual, indefinite restraint upon the alienation or other disposition or use of the house. The plaintiff bound himself for a lifetime, if the business should so long yield enough to pay its expenses, to furnish his guns, etc., and his own personal labor and services, to the carrying on of the business, for which he might receive a bare farthing, or no compensation at all. How was the end of the contract to be ascertained? Let us suppose the parties at a disagreement as to whether the business was profitable, or sufficient to pay expenses, the solution of which was necessary to determine whether it should proceed or be dissolved. The plaintiff, we will say, contends that upon a fair consideration and estimate of the assets and liabilities, and of repairs, replenishments of stock, and other expenses necessary to be incurred, the business is not paying expenses, to say nothing of the loss of his own time and services and use of his property. The defendant contends, upon like considerations, that the business is paying expenses and ought to proceed. Is there a conceivable remedy in a court of justice for the settlement and decision of the difference, which would be finally determinative of the right to have the business continue for any definite time, or be dissolved?

"Again, in all human conception, what is the measure of damage for the breach of an agreement like this? The only measure alleged is the loss of anticipated profits. Conceding that past profits are

legal *criteria* by which to judge the future, for or upon what period of time must the future profits be computed? Does the plaintiff, in his declaration or proof, point us to a time certain, or in the remotest degree probable, when the business would have ceased to pay expenses? Shall the court arbitrarily assume that it would have paid expenses, and therefore be entitled to continue, as a going concern, for the residue of the plaintiff's life, and that profits such as the business had earned should be awarded him for the entire period of his life expectancy? His personal services, under the contract, entered largely into his profits. Shall he remain idle the rest of his days, and require the defendant to pay him the value of his services, or shall he utilize his services while he lives, and earn, possibly, more than they would have realized in the shooting business, and make the defendant no allowance therefor? How are these alleged rights, the outgrowth of such indefinite duration and unknown circumstances, to be ascertained upon any sort of practical or tangible basis? The plaintiff's loss, manifestly, rests in the idlest conjecture. In Erwin v. Erwin, 25 Ala. 236, and Howard v. Railroad Co., 91 Ala. 268; 8 South. 868, we laid down the principle that, when no breach of a contract could be assigned which could be compensated by any criterion of damages to be furnished by the contract itself, the contract is void for uncertainty. That principle is decisive of this case."

Apply this language to the case at bar. The United States is left by the contract absolutely free to increase the amount to be dredged to any extent, and consequently the damages, being the difference in the reasonable cost of doing so much of the dredging as United States decides to do, and the price fixed by contract.

*Davie et al. v. Lumberman's Min. Co.*, 53 N. W. 625.

"Plaintiffs made a verbal agreement with defendant to work in its mine, and to receive $1.50 per ton for all the ore they produced 'as long as they could make it pay'. Defendant refused to allow them to continue their work, and they sued for damages. *Held*, that the contract was not enforceable as an executory contract, because of its uncertainty and want of mutuality."

2. Closely allied to this defect is the other of want of mutuality. *The United States is seeking to enforce a unilateral contract in which it is the promisee.* The original contract must be held to have been one consisting of an offer by the United States to pay 15 cents per cubic yard for items 1 and 3, and 99 cents per cubic yard for items 2 and 4, with no obligation on New York Dredging Company to perform, but of course the right to collect in case of performance. Had the amount to be dredged been capable of ascertainment, and had the United States been bound to have so much dredging done, then the contract would have been capable of enforcement by either party.

Supposing that during the period of the 16 months the funds allotted for the work were curtailed or embezzled so that at the price being paid by the United States, only 10,000 cubic yards could be paid for, and that accordingly the United States caused the limits marked for dredging to be made smaller, could New York Dredging Company have succeeded in recovering damages for failure to allow it to complete the million

cubic yards? We think not. For by the contract the United States reserved the right to diminish the amount to be dredged according to the funds available. Supposing that the next day after the work was commenced by New York Dredging Company, the appropriation had been absolutely cut off, could New York Dredging Company recover damages for its expenditures in locating its plant and for the profits to be made in the work. We think not. The United States absolutely reserved the right to have the amount dredged depend upon the funds available. It was a unilateral contract whereby the United States offered to pay a certain amount for all dredging done at Port Royal. New York Dredging Company was at liberty not to do any more dredging at any time, for it had no recourse in damages against the government should the government refuse to have more work done. One party to the contract cannot be liable in damages when the other is not.

> "Mutuality of contract means that an obligation must rest on each party to do or to permit to be done something in consideration of the act or promise of the other, that is, neither are bound unless both are bound."
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> *7 A. & E. Encyc. Law*, 114.

> *9 Cyc.*, 327.
>
> "There are many cases in which, although the offer is definite enough, yet the accepter by merely accepting has really himself promised nothing in return, has not made himself liable for anything, so that, although one is bound the other is not, and the engagement lacks what is called mutuality. In

such a case there is not an enforceable agreement. The most frequent example of this principle is when one offers to supply another with such goods of a certain kind as he may choose to order or may 'wish' during a certain time, and the other accepts the offer. Here there is no consideration for the promise or offer, for the promisee has not bound himself to anything, and has incurred no liability at all. The correct view of the case is that there is no agreement binding on the promisor, but simply an offer on his part which may be accepted by giving an order until such time as it is actually withdrawn or expires by limitation of time."

*Dorsey v. Packard,* 12 Howard 126; 9 Cyc. 328.

"In this case, the purchaser of a plantation bound himself to transfer to his son-in-law one-half of the plantation, slaves, cattle and stock, as soon as the son-in-law should pay for one-half of the cost of said property, either with his own private means, or with one-half of the profits of the plantation. It was held not enforceable, the court saying: 'It is signed by both parties in the presence of attesting witnesses; and is expressed in clear and precise terms. But there is one characteristic necessary to give it validity as a binding contract, in which it is entirely deficient. It wants mutuality. It imposes no obligation on Dorsey whatever. He is not bound either to render services or pay money as a consideration for one-half the land. Packwood could not support a suit upon it to compel Dorsey to do anything.'"

An agreement is not binding on either party unless both are bound. In the case at bar the United States was not bound to anything whatever. It had the absolute right under its contract to stop the work at any time, to change the amount of dredging to any extent,

and New York Dredging Company could have no cause of action. Can New York Dredging Company be held by such an agreement?

There are many cases found where the parties agreed to buy and sell goods at a price fixed, to be delivered in such quantities as the one party should designate. In all these cases it is held that unless there is some obligation fixed upon the buyer to order goods, there can be no recovery by buyer where seller refuses to perform.

*Morrow v. Southern Express Co.*, 28 So. 998.

Railway company not liable for refusal to carry at certain rate as plaintiff did not agree to furnish any freight.

*Jordan et al. v. Indianapolis Water Co.*, 61 N. E. 12.

Company did not agree to furnish any definite, or in fact any quantity, hence purchaser not liable to take any. Company had unlimited option.

See also

*Vogel v. Pekoc*, 42 N. E. 386.

See

*Crane et al. v. C. Crane & Co.*, 105 Fed. 869.

"While one may bind himself by a contract to furnish another with such supplies as may be needed during a specified period of time for some certain business or manufacture, or with such commodities as the purchaser has already contracted to furnish to others, the quantity in such cases

being capable of at least approximate estimation when the contract is made, an agreement by a wholesale dealer to supply a retailer during a certain time at stated prices, with so much of a commodity as the purchaser may require for his trade, which leaves it practically optional with the purchaser to increase or diminish his orders with the rise or fall of prices, as may be most to his advantage and the corresponding disadvantage of the seller, is void for want of mutuality.

"It is within legal competency for one to bind himself to furnish another with such supplies as may be needed during some certain period for some certain business or manufacture; or with such commodities as the purchaser has already bound himself to furnish another. Reasonable provision in business requires that such contracts, though more or less indefinite, should be upheld. Thus a foundry may purchase all the coal needed for the season; or a furnace company its requirements in the way of iron; or a hotel its necessary supply of ice. Minnesota Lumber Co. v. Whitebreast Coal Co., 160 Ill. 85, 43 N. E. 774; National Furnace Co. v. Keystone Mfg. Co., 110 Ill. 427; Railway Co. v. Witham, L. R. 9 C. P. 16; Smith v. Morse, 20 La. Ann. 220. So, too, a dealer in coal in any given locality may contract for such coal as he may need to fulfil his existing contracts, regardless of whether delivery by him to his customers is to be immediate or in the future. Shipman v. Mining Co., 158 U. S. 356, 15 Sup. Ct. 886, 39 L. Ed. 1051. In all these cases, contracts looking towards the future, and embodying subject-matter necessarily indefinite in quantity, have been upheld; but it will be observed that, although the quantity under contract is not measured by any certain standard, it is capable of an approximately accurate forecast. The capacity of the furnace, the needs of the railroad, or the requirements of the hotel are, within certain limits, ascertainable by the vendor. He is thus enabled to make reasonably accurate calculations

of the extent of his obligation. Then, too, the purchase is only an incident of the vendee's business. Presumably the business will go on irrespective of a rise or fall in the prices of subsidiary supplies. There thus remains to the vendee little or no temptation, on account of the rise or fall in prices, to greatly enlarge or diminish the quantity of his orders.

"The contracts brought to our attention have no such standard of approximate certainty, and no such safeguard against opportunity to impose upon the vendor. Plaintiffs in error were at the time engaged in no manufacture or business that required dock oak lumber as an incidental supply, nor were they under any contract to deliver such lumber to third persons at fixed prices. They were lumber merchants pure and simple—middlemen between the defendant in error, and such customers as usually come to a merchant. Should the contract under discussion be upheld, the plaintiffs in error would be held to occupy this advantageous situation: If the prices of dock oak lumber rose, they would, by that much, increase their ratio of profits, and probably, coming into a situation to outbid competitors, increase, also, the quantum of orders; if, on the other hand, prices fell below the range of profits, the orders could be wholly discontinued.

"On the contrary, the situation of the defendant in error would be this: Should prices fall, it could not compel the plaintiffs in error to give further orders; but, should prices rise, the orders sent in would be compulsory, and the loss measured, both by the increase of the ratio of profits, and the probable increase of the quantum of orders. It is needless to say that such a contract is unilateral, and void for want of mutuality. It, in effect, binds the defendant in error alone, for it leaves the plaintiffs in error—whose whole interest is embodied in the prices obtainable—in a situation to either go on, or to discontinue, as such interest develops."

In this case the necessity for some means of ascertaining with some certainty the burden imposed by the contract is brought out. But as stated above, there was no means whereby the burden on New York Dredging Company could be ascertained at all, the quantity of dredging being left absolutely to be determined by United States.

> *Harvester King Co. v. Mitchell, Lewis & Staver Co.*, 89 Fed. 173.
>
> "A contract by which one party agrees to order from the other all of certain machines and extras required to supply the trade of a certain territory, which the second party agrees to furnish 'without any liability for damages for failure from any cause to furnish such machines and extras', creates no obligation on the part of the second party, and is without mutuality."

In the case at bar there could be no damages recoverable against United States; if, the funds being cut off, it had absolutely refused to pay for any dredging at all under the contract; that is to say, the United States had the absolute right to determine how much or how little was to be dredged.

> *American Cotton Oil Co. v. Kirk et al.*, 68 Fed. 791.
>
> "A contract to sell and deliver 10,000 barrels of oil, at a stipulated price, in such quantities per week as the buyer may desire, to be paid for as delivered, but which contains no agreement on the part of the buyer to purchase, and receive any particular quantity of oil, is not binding, for want of mutuality."

*Dennie v. Slyfield,* 117 Fed. 474.

> "A contract which recited that the second parties were 'desirous to ship by vessel certain lots of hardwood lumber', and by which the first party agreed to carry on his vessels 'any and all of this lumber as may be desired by the parties of the second part', is void for want of mutuality."

The case at bar is easily distinguishable from the cases cited in

*Crane v. Crane,* 105 Fed. 869, *supra,*

where agreements to furnish such supplies as may be needed during a certain period for certain business or manufacture have been upheld; for in those cases, as was said in

*Crane v. Crane,*

> "The capacity of the furnace, the needs of the railroad, or the requirements of the hotel, are within certain limits ascertainable by the vendor."

In the case at bar the United States could vary the amount of work to be done to any extent, could vary the location of area to be dredged to any extent, and in fact, as is shown, decided to have performed only 149,000 cubic yards instead of one million, and claims that the contract is performed.

*Cold Blast Transp. Co. v. Kansas etc. Co.,* 114 Fed. 81.

> "The rules applicable to contracts of this class may be thus briefly stated: A contract for the future delivery of personal property is void, for want of consideration and mutuality, if the quantity to be delivered is conditioned by the will, wish or

want of one of the parties; but it may be sustained if the quantity is ascertainable otherwise with reasonable certainty. An accepted offer to furnish or deliver such articles of personal property as shall be needed, required, or consumed by the established business of the acceptor during a limited time is binding, and may be enforced, because it contains the implied agreement of the acceptor to purchase all the articles that shall be required in conducting his business during this time from the party who makes the offer. Wells v. Alexandre, 130 N. Y. 642, 29 N. E. 142, 15 L. R. A. 218; Minnesota Lumber Co. v. Whitebreast Coal Co., (Ill. Sup.) 43 N. E. 774, 31 L. R. A. 529; Parker v. Pettit, 43 N. J. Law 512. *But an accepted offer to sell or deliver articles at specified prices during a limited time in such amounts or quantities as the acceptor may want or desire in his business, or without any statement of the amount or quantity, is without consideration and void, because the acceptor is not bound to want, desire, or take any of the articles mentioned.*

"Bailey v. Austrian, 19 Minn. 535 (Gil. 465); Tarbox v. Gotzian, 20 Minn. 139 (Gil. 122); Railway Co. v. Bagley, 60 Kan. 424, 433, 56 Pac. 759; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869. Accepted orders for goods under such void contracts constitutes sales of the goods thus ordered at the prices named in the contracts, but they do not validate the agreements as to articles which the one refuses to purchase, or the other refuses to sell or deliver, under the void contracts, because neither party is bound to take or deliver any amount or quantity of these articles thereunder. Crane v. C. Crane & Co., 45 C. C. A. 96, 105 Fed. 869; Oil Co. v. Kirk, 15 C. C. A. 540, 68 Fed. 791; Campbell v. Lambert, 36 La. Ann. 35; Railway Co. v. Mitchell, 38 Tex. 85, 95; Ashcroft v. Butterworth, 136 Mass. 511, 514; Drake v. Vorse, 52 Iowa 417, 3 N. W. 465; Thayer v. Burchard, 99 Mass. 508, 520; Hoffmann v.

Maffioli, (Wis.) 80 N. W. 1032, 1035, 47 L. R. A. 427; Railroad Co. v. Jones, 53 Ill. App. 431, 437; Rafolovitz v. Tobacco Co., (Sup.) 25 N. Y. Supp. 1035."

New York Dredging Company were entitled when they had dredged under the contract to be paid therefor at the contract price for so many cubic yards as had been dredged. The contract between the United States and New York Dredging Company did result in rights and liabilities when the work had been performed. New York Dredging Company, under the contract, went to work and excavated 80,418 cubic yards, all of which they placed on shore; and of this material excavated 54,531 cubic yards was rock, although it was believed by both parties that the material to be excavated was mud, sand and soft clay.

This work had been done by New York Dredging Company at a great loss. They had placed on shore nearly twice as much as had been required by the estimate in the specifications, and two-thirds of what they had dredged was rock. They had no means of ascertaining how much the United States was going to require to be dredged. The United States had the right to require over a million cubic yards, or the United States had the right to stop the work at any time, and the New York Dredging Company could recover no damages. Under these circumstances, the New York Dredging Company had the right to stop the work at any time; because the United States was not bound, New York Dredging Company could not be bound. The contract lacked mutuality.

In view of this last contention, it is plain that the complaint fails to state a cause of action, and should be dismissed.

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## V.

## The Contract Was Void for Uncertainty and Want of Mutuality.

The proper construction of this contract is a difficult matter. The various decisions of the court of claims and opinions of the Attorney Generals have certainly left the proper construction of these government contracts very obscure. The plaintiffs in error admit that the United States had the right under the contract to require the dredging of approximately 1,000,000 cu. yds. That is to say, they admit it, with the reservation, that the United States only had the right in case further appropriations were made sufficient to pay for that much dredging.

> "The sureties undertaking was that the contract should be completed, whether one cubic yard was, or one million cubic yd. were, deposited on shore" (at p. 23).
>
> "Of course, the contract could have no bearing upon a certain appropriation until such an appropriation was made, but if it had been made within a reasonable time and within the limit of time provided for the performance of the contract executed by the parties, it probably would have been incumbent on the contractor, not only to have dredged an amount sufficient to consume the appropriation made first available, but also to continue the work to the maximum limit of about one million cubic yards" (p. 55).

If United States had the right to one million cubic yards, we see nothing to prevent United States from requiring more than one million. The limits of the dredging could be enlarged when the required depth was reached on the area as originally marked for dredging. The contract so provides. The contract either gave to United States an unlimited option, or it was for the performance of a certain specific work, to wit, the making of a deep water basin in the channel opposite the station. If the first construction be adopted, the contract is void for uncertainty and lack of mutuality. If the second be adopted, there is a total absence of anything showing the cost of completion, the damages, for it does not appear that the work was ever finished.

The position of plaintiffs in error is an appeal to certain statutes of the United States and the decisions thereon in the court of claims and the opinions of the Attorney Generals. They claim that the additional appropriations not having been made, the contract was definitely for enough dredging to exhaust the original appropriation, and void for any excess. Reliance is placed on the rule that where a contract on its face assumes to provide for all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation. This rule is illustrated by the case of

*Shipman v. U. S.*, 18 Ct. Cl. 146.

Congress appropriated $7,000 to build a certain road. Shipman made a contract, which in terms referred to

the act and the appropriation to build the road according to certain specifications for $7,000. *Held,* he could not recover any more.

We think that there is a great difference between that case and the case at bar, accepting the government's theory that the contract was not for a definite work, to wit, a deep basin opposite the station. In our case, no reference is made to the amount of the appropriation, and it appears that there were other expenses to be met out of the $150,000 appropriated, and that the whole amount of that appropriation was not to be paid to New York Dredging Company. The total paid under the two contracts was $138,386.77 for dredging (see Trans. p. 39, Agreed Stat., Par. XVII). To make this case fit the rule stated it would be necessary to read into this contract an agreement to dredge for United States as many cubic yards of material at the prices fixed as would exhaust $150,000. If such was the contract of New York Dredging Company, it appears that the United States has never finished it; and should have advertised for bids to expend $96,014.41, instead of $87,000 as was done, the amount which would have been left unexpended after New York Dredging Company ceased work:

| | |
|---|---|
| Appropriation ..... | $150,000.00 |
| Paid New York Dredging Co..... | 53,985.59 |
| Balance to be expended..... | $ 96,014.41 |

In case of *Brown v. United States, supra,* the contract was of that kind, the amount of stone was to depend on

the price and the contract was to exhaust $45,000. So in Shipman case.

If this contract was for the excavation of enough material at Port Royal to comply with the specifications as to making a deep water basin opposite the station, approximately 1,000,000 cubic yards, then it was void as being in violation of Rev. Stat., Sec. 3733. If that was the contract we do not believe it could be upheld as valid to the extent of the appropriation made. We find no case where it is held that a contract for a public improvement which binds the government to pay a larger sum than is appropriated for that purpose is valid as to the amount actually appropriated. That is, if this is a contract for approximately one million cubic yards, at a price which makes the total exceed $150,000.00, the contract is absolutely void, and no recovery can be had under it by either party.

> "If Congress appropriates a certain sum to be expended by the secretary of war for the improvement of a river the secretary exceeds his power when he makes a contract for more work than the appropriation will pay. 9 Op. Atty. Gen. 18.
>
> "After an appropriation is exhausted, a contract not for the completion of any specific work, as the erection of a building, the construction of a road, or rendering a channel adequate for the passage of vessels of certain draft, is at an end. Work done after the appropriation is exhausted would not come within such a contract. Executive officers are prohibited by secs. 3679, 3732, 3733, 5503, R. S., from continuing the employment of the contractors. If further appropriations are made, there must be a new contract for their expenditure. (1895) 21 Op. Atty. Gen. 244; (1857) 9 Op. Atty. Gen. 18."

It would be unconscionable to hold that United States could advertise for bids for a certain work of dredging approximately one million cubic yards, so as to form a deep water basin, 30 feet deep, on a marked area; accept a bid based on that amount of work; and then hold the contractor to a contract for dredging a very much smaller quantity at the same rate because the appropriation was not sufficient to pay for the work as originally planned, for which bid was submitted. Such would be the construction asked by the government in this case. It is plain that the bid of New York Dredging Company was based on the work to be done, viz.: constructing a deep-water basin opposite the station to a depth of 30 feet, approximately one million cubic yards, and not merely to dredge enough to exhaust $150,000.

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**LIQUIDATED DAMAGES.**

The plaintiffs in error cannot now be heard on the question of the claim for liquidated damages urged in the Circuit Court, such claim was disallowed by that court. Judgment for actual damages only was ordered and entered in the trial court, plaintiffs in error were not aggrieved thereby. They took no exception to such order and judgment; they did not appeal from such judgment. It is now final as to plaintiffs in error. The complaint asked for "damages in the sum of $57,338.02, " of which said sum $25,588.02 represents the difference " between what the defendant New York Dredging Com- " pany agreed to perform the work of dredging for

" and what it actually cost these plaintiffs to complete " the work under the contract with P. Sanford Ross, " and of a further sum of $31,750.00, being liquidated " damages provided for by the contract" (Trans. p. 3). The court ordered judgment in the sum of $25,588.02 and interest which was accordingly entered at $25,-588.02 and interest, amounting in all to the sum of $33,389.52 (Trans. p. 34).

Although the amount of judgment entered by the Circuit Court shows clearly that it does not include any liquidated damages, and there is no showing of any actual damages to United States on account of delay, as plaintiffs in error apparently still insist on these damages, we shall state the reasons which we presented to the court below why the liquidated damage cannot be recovered, and which were considered sufficient.

Specification 21 provides that in case the completion of the work is delayed beyond date for completion, " *deductions of $50 per day during such delay may, in* " *the discretion of the Secretary of the Navy,* be made " from the contract price of said work, as liquidated " damages" (Trans. p. 11). We contend that as, by the very terms of the contract, the deductions were not absolutely to be made "*during* such delay" without any deduction, it is now too late to claim credit for the fifty dollars ($50) per day at all. The agreement that in the discretion of the Secretary of the Navy deductions of fifty dollars ($50) per day might be made, was evidently intended to mean for delays that were in the opinion of the Secretary of the Navy unwarranted. It

is clear that it was the intention of the parties that the discretion should be exercised or judgment passed, before the amounts earned were paid. The claim that a demand by the Chief of the Bureau of Yards and Docks, made several years after the last payment had been made under the contract, and after work had stopped and the contract had been canceled, amounts to an exercise of the discretion or judgment of the Secretary of the Navy that a deduction should be made, is no more reasonable than it would be to claim that if the contract had been completed and the contractor paid in full, but after the date set for completion, the government might years later make demand for liquidated damages for the delay and recover same in an action.

It will be noted that the clause in question states that " deductions of $50 per day during such delay may, in " the discretion of the Secretary of the Navy, be made " from the contract price of said work, as liquidated " damages". The deductions may be made *during* such delay. The work was to be paid for monthly, except ten per cent (10%). Therefore, the deductions were to be made from each payment at the rate of fifty dollars ($50) per day for each day the completion of the work was overdue, if it was decided by the Secretary of the Navy that it would be proper to do so, in view of the cause of delay. It appears from the agreed statement that unforeseen difficulties were met with and that the work was carried on by the New York Dredging Company at an actual loss. And the record shows clearly that it was not the intention to make any deduction had the work been completed.

There was a provision in the contract proper that for a *default* by the contractor, the government could recover $30,000 as liquidated damages (Trans. p. 7). This provision leaves nothing to the discretion of the Secretary of the Navy. The two provisions must surely be taken together to mean that if the work was delayed beyond the date set *deductions* might be made from the payments subsequently made, and that if the work was never finished the limit of the damages that could be recovered for default would be $30,000. If the stale demand made by the department is to be regarded as fixing on the New York Dredging Company a liability for $31,750, because of the $50 per day deduction provision, it is conceivable that the government might have waited for six years after the New York Dredging Company quit work before completing it; and then, on demand being made, be entitled to a judgment for $109,500. The only reasonable construction of specification 21 is that it was to apply only in case the work was completed by the original contractor, and in no event when the work was abandoned and finished by the government. See *Fidelity & Deposit Co. v. Robertson,* 34 So. Rep. 933 (p. 944).

According to some holdings, a stipulation of this kind is to be regarded as a penalty, because it is in the power of the owner to terminate the contract and relet the work, and thus shut off the damage for delay. See *Brennan v. Clark,* 45 N. W. 472.

Any other construction would allow the government to abandon the work for years, then take it up, and

when finished sue the original contractor for fifty dollars ($50) a day for all the delay. Such was surely not the intent of the parties, and such a construction must be rejected. The proper construction of this provision is that this clause simply allowed a deduction from payments due, in case of completion by original contract and a decision by the Secretary of the Navy that deductions should be made, and that in no case can there be a recovery against defendant for any sum already paid on account of this clause.

Counsel for plaintiffs in error have cited, as authority that the provision in question is for damages, although the amounts were to be deducted, *Texas etc. Ry. Co. v. Rust,* 19 Fed. 239. But in that case there was, in the corresponding clause, nothing left to discretion. The provision is:

" In case of non-completion of the bridge upon No-
" vember 1, 1882, or providing a crossing for trains by
" said date, then in such event the sum of $1,000 per
" week for the period of time such completion or pro-
" vision for crossing of trains is delayed shall be de-
" ducted from said contract price; and in like manner,
" should the bridge be completed at an earlier date than
" November 1, 1882, then in such event the sum of
" $1,000 per week shall be added to said contract price,
" for the period by which said fixed date of completion
" shall be anticipated."

Furthermore, in that case the work (constructing a bridge) was to be done for a fixed price: $305,000. In the case at bar there was no contract price. The work

was paid for at so much per cubic yard, and paid for at the end of each month except ten per cent (10%). In any event, that case cannot be regarded as controlling, as the other provisions of the contract do not appear, and as it is merely a statement of law by a circuit judge charging a jury and there was no appeal.

In *Hennessy v. Metzger,* 38 N. E. 1058, 42 Am. St. 267, the deduction had been made. It was not a suit for damages at all, so it has no application here.

In *Wolf v. Des Moines etc.,* 20 N. W. 481, the suit was by contractor to recover the ten per cent retained, which by the terms of the contract was to be retained as liquidated damages. There was nothing left to discretion. It was a straight, certain provision for liquidated damages for breach.

Counsel for plaintiffs in error have cited no case like the case at bar, where there was an action by an owner against a contractor for liquidated damages under a clause similar to the one in question. It may be conceded that there are many decisions to the effect that an owner can recover for delay the liquidated damages provided by the contract, where there is an unequivocal provision and the work is completed by the original contractor after the date set.

Whether a provision in a contract provides for liquidated damages or for a penalty, is a matter to be decided upon according to the peculiar facts and circumstances surrounding the case, and the language used in the contract. The use of the term "liquidated damages" is

not of itself sufficient to show that such was the real intent of the parties. "Liquidated damages" may be held to be penalty and *vice versa.*

See:

*19 Am. & Eng. Encyc.,* 400; and
*13 Cyc.,* 92, and cases cited.

The test for distinguishing provisions for liquidated damages and provisions for penalties, is said to be the intent of the parties, as gathered from the instrument as a whole, the situation of the parties, the subject matter of the contract, and all the circumstances surrounding its execution. This rule is subject to the following qualifications: the intent of the parties will not be regarded if illegal, nor where the result would be manifestly contrary to the general rule that *damages are merely compensation,* nor where the contract is for the payment of money. In the case at bar it may be admitted that the damages for delay are a proper subject for liquidated damages, and that there was delay in completing the work. But did the contracting parties in this case ever agree that liquidated damages should be paid in any event? The deduction was to be made "in the discretion of the Secretary of the Navy". Now the damages to the plaintiff would be just the same whatever the cause of the delay; and a provision fixing the amount of such damage according to the length of delay would be certain. But these contracting parties did not have in mind damages for delay from *any* cause. They left it to the discretion of the government whether to make the deduction or not, and thereby clearly showed

that the deduction was to be a penalty for wilful, uncalled-for delay on the part of the contractor. For delays on account of unforeseen difficulties in equity and good conscience, no deduction should be made. Leaving the deduction to the discretion of the government is reasonable, when viewed as a penalty, since the penalty should be proportioned to the misconduct of the contractor; but the damages would bear no relation to the cause of delay and a provision fixing their amount would naturally be certain and leave nothing to discretion of anyone.

It is the rule that in doubtful cases the court will hold a provision of this kind to be for a penalty, not for damages. See:

*19 Am. & Eng. Encyc. of Law,* 397; and
*13 Cyc.,* 95, cases cited.

We submit that, in the present case, the government's right to these liquidated damages is, at best, doubtful, and therefore they should not be allowed. It nowhere appears how the amount claimed, $31,750.00, was arrived at, and therefore the proof fails on this branch of the case, as it is incumbent on the government to prove its damages with some degree of accuracy, especially where the claim is for so much per day.

For these reasons, viz.:

That specification 21 does not provide for liquidated damages at all;

That the condition in specification 21 under which, if at all, deduction could be made, was not complied with by the defendants in error;

That the specification could only properly be applied when the work was completed by New York Dredging Company;

That the intention of the parties was that the deduction should be a penalty for wrongful delay;

That there is surely a doubt as to the right to these damages;

That the amount has not been shown;

We respectfully submit that the claim for liquidated damages for delay be rejected.

As we have stated before, we do not regard the question of liquidated damages as still open, but that this court may be fully advised as to the reasons why no liquidated damages were allowed, we have deemed it proper to insert the foregoing which is our argument as presented to the lower court on the subject.

In conclusion, we desire to call attention once more to the fact of the fundamental rule in this case: A surety is entitled to stand on the very letter of his contract. It is often said that a surety is "a favorite of the law".

Would it be construing the contract of the sureties in this case in accordance with this rule to hold that their contract permitted the time for the performance of the work to be almost doubled? permitted the United States to reduce the amount to be dredged from approximately 1,000,000 cubic yards to less than 150,000 cubic yards? merely because in the specifications for the work, in response to which the bid was made, there are certain

provisions stating that the government was opposed to extensions of time, and would not agree to grant them under any conditions. Is it construing the sureties' contract strictly to hold that, where the contract provides that the changes therein could only be made by agreement signed by the parties, and the sureties are parties, the contract could be changed without their signature?

We have made the following points on which we think the judgment should be affirmed in favor of these defendants in error for their costs:

1. The time of performance was extended without the consent of the sureties.

2. The work done was changed without the consent of the sureties.

3. The government annulled the contract without reserving the right to complete the work and charge the cost of completion to the contractor and sureties.

4. The government has failed to show the amount of damages.

5. The contract between United States and New York Dredging Company and sureties is not enforceable by the United States because of uncertainty and want of mutuality.

Dated this 1st day of September, A. D. 1911.

BURKE CORBET,
JOHN R. SELBY,
EDWARD J. LYNCH,
*Attorneys for John McMullen and Joseph A. Stulz, as Administrator, etc., Defendants in Error.*

# UNITED STATES *v.* McMULLEN ET AL., ADMINISTRATORS.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

No. 100. Argued December 13, 14, 1911.—Decided January 9, 1912.

Under the provisions of the contract in this case for possible extensions of time, the sureties on the bond which was part of the contract were not discharged by reason of the extensions which were granted pursuant to the contract.

Where there is a penalty for avoidable delay in performance of a government contract, sureties are not discharged because the Government does not take steps against the contractor to collect the penalties.

*Quære*, whether where the contractor is given a right to extension of time if the Secretary of Navy approves, the Secretary is to be regarded as a third party or as representing the United States.

Annulling a contract by the Government does not mean in this case that the Government rescinded or avoided it, but that it would proceed no further with the contractor and would charge him with the difference in cost caused by his default.

When the Government relets a contract after default, the price for which it is relet must be assumed to be reasonable in absence of evidence to the contrary, and this is especially so when the difference is less than the sum stipulated as liquidated damages.

When the Government relets a contract, the sureties are not relieved because there are differences in the terms which diminish the cost of the work as relet.

A government contract is not unenforcible for want of certainty and mutuality because it allows changes by the United States, subject to provisions for change of compensation where proper.

The amount of work to be done under a government contract depends upon the appropriations made by Congress for carrying on the work, and this is implied whether expressed in the contract or not.

Where the answer does not deny that the contract was signed by the United States and the contract declares that it is, and it is signed by the Chief of Bureau of Yards and Docks, there is admission by implication that it was signed by the United States and is sufficient.

167 Fed. Rep. 460; 93 C. C. A. 96, reversed.

THE facts, which involve the liability of contractors and sureties upon a contract with the United States for dredging and a bond given for completion thereof, are stated in the opinion.

*The Solicitor General* for the United States.

*Mr. Burke Corbet*, with whom *Mr. John R. Selby* and *Mr. Edward J. Lynch* were on the brief, for defendants in error:

The time of performance was extended without the consent of sureties, and thereby they are discharged. *Miller* v. *Stewart*, 9 Wheat. 680; *Reese* v. *United States*, 9 Wall. 13; Fed. Cas. No. 9591; *Driscoll* v. *Winters*, 122 California, 66.

The only rule for the construction of a surety's obligation to perform a contract of suretyship is that of *strictissimi juris*. *Guarantee Co.* v. *Pressed Brick Co.*, 191 U. S. 416; *United States* v. *American Surety Co.*, 200 U. S. 197; see also *A. T. & D. Co.* v. *Laurinburg*, 163 Fed. Rep. 695; *Henry* v. *Artona Ins. Co.*, 79 Pac. Rep. 42; *Bappart* v. *Illinois Surety Co.*, 126 S. W. Rep. 771; *Lonergan* v. *S. A. L. & T. Co.*, 104 S. W. Rep. 1067; *Smith* v. *United States*, 2 Wall. 235; *United States* v. *McIntyre*, 11 Fed. Rep. 597; *United States* v. *Freel*, 186 U. S. 309.

A change in the time of performance of a contract is a material change, and will release sureties. *Earnshaw* v. *Boyer*, 60 Fed. Rep. 528; *Rowan* v. *Sharp's Rifle Mfg. Co.*, 33 Connecticut, 1; *United States* v. *Freel*, 92 Fed. Rep. 299; *S. C.*, aff'd 186 U. S. 309; *United States* v. *Howell*, Fed. Cas. No. 15,405; *Lane* v. *Scott*, 57 Texas, 367; *United States* v. *De Visser*, 10 Fed. Rep. 642; *Whitcher* v. *Hall*, 5 B. & C. 269; *Samuel* v. *Howarth*, 3 Merivale, 272; *Todd* v. *School Dist.*, 40 Michigan, 294; *Judah* v. *Zimmerman*, 22 Indiana, 388; *Barber* v. *Burrows*, 51 California, 404; *Fidelity Dep. Co.* v. *United States*, 137 Fed. Rep. 866.

It is the alteration of the contract, not the increase of

risk, that discharges the surety. *Victor Co.* v. *Scheffler*, 61 California, 532.

The special language in *United States* v. *Gleason*, 175 U. S. 588, 603, distinguishes it from this case; see *Davis* v. *La Crosse Assn.*, 99 N W. Rep. 351; *Curry* v. *Olmstead*, 59 Atl. Rep. 392; *Stubbings* v. *World's Col. Exp. Co.*, 110 Ill. App. 210; *Phœnix Bridge Co.* v. *United States*, 38 Ct. Cl. 492.

The courts construe very strictly language claimed to be a consent in advance by the sureties to changes in the contract. Brandt on Suretyship, 3d ed., § 423; *Miller* v. *Spain*, 41 Oh. St. 376; *United States* v. *Freel*, 186 U. S. 309; *Plunket* v. *Davis Sewing Machine Co.*, 36 Atl. Rep. 115; *Lodge* v. *Kennedy*, 73 N. W. Rep. 523.

In the cases relied on by appellant there was a distinct provision that the owner should have power to alter the plans and specifications, and that such alterations should not in any manner invalidate the contract. In none of the cases was there a provision, as there is in this case, that the changes should be made in writing and signed by the parties, where the sureties are such parties: such were the cases of *Chester* v. *Leonard*, 68 Connecticut, 495; *Wehr* v. *St. Matthews Cong.*, 47 Maryland, 177; *U. S. F. & G. Co.* v. *United States*, 191 U. S. 416; *Am. Sur. Co.* v. *San. Ant. Loan & Tr. Co.*, 98 S. W. Rep. 387; *Reissaus* v. *White*, 106 S. W. Rep. 607; *Hayden* v. *Cook*, 34 Nebraska, 670; 52 N. W. Rep. 165.

The United States, in so far as it contracts with private individuals, is subject to the same laws, and its contracts are to be construed as though made by private individuals. *United States* v. *Boswick*, 94 U. S. 66; *Adle* v. *Metoyer*, 1 La. Ann. 254.

The change of the time of performance amounted to a new contract on that point.

While part of the contract was yet to be performed, the parties by mutual agreement changed one of its terms

and substituted a new term on that point. See cases *supra*.

The original contract does not provide for extensions of time.

It is only where the original contract provides that one of the parties *shall*, not *may*, in certain cases make a change, or provides that no change made shall invalidate the contract, is the surety bound when the change is made. Such are the cases of *Pascault* v. *Cochran*, 34 Fed. Rep. 358; *St. Louis Brewing Co.* v. *Hayes*, 71 Fed. Rep. 110; *Glass Co.* v. *Matthews*, 89 Fed Rep. 828; *Mattingly* v. *Riley*, 49 S. W. Rep. 799; *Stevens* v. *Pendleton*, 83 Michigan, 342; *N. Y. Life Ins. Co.* v. *Loomis*, 100 Wisconsin, 17; *Stein* v. *Jones*, 18 Ill. App. 543; *Western Bldg. Co.* v. *Fitzmaurice*, 7 Mo. App. 283; *Standard Co.* v. *Stone*, 35 N. Y. App. Div. 62; *People's Lumber Co.* v. *Gilliard*, 136 California, 55.

In every case on which the court below relied the contract contains a provision by which contractor binds himself to make change if desired. See *Village* v. *Leonard*, 68 Connecticut, 495; 37 Atl. Rep. 397; *De Mattos* v. *Jordan*, 15 Washington, 378; 46 Pac. Rep. 402; *Northern Light Lodge* v. *Kennedy*, 73 N. W. Rep. 524; *Beers* v. *Wolf*, 116 Missouri, 179; 22 S. W. Rep. 620; *Hayden* v. *Cook*, 34 Nebraska, 670; 52 N. W. Rep. 165.

The contract in the case at bar did not contemplate supplementary agreements extending the time for performance, within the meaning of the rule in these cases, nor within the meaning of any rule counsel has found.

The liability of a surety is never to be extended by implication. *Reese* v. *United States*, 9 Wall. 14.

If the contract is construed so as to provide for changes as to time and other points, such changes could only be made by agreement signed by sureties. *Beers* v. *Wolf*, 22 S. W. Rep. 620, *supra; Lodge* v. *Kennedy*, 73 N. W. Rep. 524; *Eldridge* v. *Fahr*, 59 Mo. App. 44; *Killoren* v. *Meehan*, 55 Mo. App. 427, and other cases *supra*.

The contract was changed by the action of the Government in agreeing that no materials should be deposited on shore.

Very slight changes in the requirements of contracts have been held to release the sureties. *United States* v. *Corwinne*, Fed. Cas. No. 14,871; *United States* v. *Tillotson*, Fed. Cas. No. 16,524; *United States* v. *Case*, Fed. Cas. No. 14,743; *Zeigler* v. *Hallahan*, 131 Fed. Rep. 205. *Cambridge Sav. Bk.* v. *Hyde*, 131 Massachusetts, 77, does not apply.

Whenever it becomes the right of the owner to complete at expense of contractor it is not necessary that the strict letter of the contract be followed. In those cases, however, the work to be done was a certain specific construction and the changes were in details of the materials or methods to be used in the construction, and it was shown that the construction was actually substantially completed as contracted for. Where that is not the case, the surety is discharged; see *Chesapeake Transit Co.* v. *Walker & Son*, 158 Fed. Rep. 850; *United States* v. *Corwinne*, Fed. Cas. No. 14,871.

The United States, having annulled the contract without reservation of right to complete the work and charge the cost of completion to contract, such cost cannot be recovered as moneys expended.

When a contract proper and specifications attached thereto are in conflict, the contract proper, or signed portion of the whole, governs. *Meyer* v. *Berlandi* (Minn., 1893), 53 Minnesota, 59; *Palladino* v. *New York*, 10 N. Y. Supp. 66; *Demarest* v. *Haide*, 52 N. Y. Sup. Ct. 398.

Viewing the action as one for damages for breach of contract, the United States has failed to show amount of damages. 13 Cyc. 162, 192; 8 Am. & Eng. Encyc. of Law, 556. See also *Insley* v. *Shepard*, 31 Fed. Rep. 869; *Goldboro* v. *Moffitt*, 49 Fed. Rep. 273, reversed, 52 Fed. Rep. 560; *Stillwell &c. Co.* v. *Phelps*, 130 U. S. 520; *Von*

*Dorn* v. *Mengedoht*, 59 N. W. Rep. 800; *Savage* v. *Glenn*, 10 Oregon, 440; *Anderson* v. *Nordstrum*, 61 N. W. Rep. 1132.

The rule is not the difference between contract cost and the actual cost; but the difference between contract cost and the reasonable cost or necessary cost. This distinction is pointed out in *State* v. *Ingram*, 27 No. Car. (5 Ired.) 441; *Cincinnati Ry. Co.* v. *Carthage*, 35 Oh. St. 631; *Fletcher* v. *Milburn Mfg. Co.*, 35 Mo. App. 321.

It has not been shown here whether or not the United States ever completed this work of construction. *Chesapeake Transit Co.* v. *Walker & Son*, 158 Fed. Rep. 850.

It cannot be said that because the accepted bid was the lowest obtainable by the advertisement made that it was reasonable for the completion of the work under the original contract, for it was not a bid to do the same or substantially the same work. *Goldsboro* v. *Moffitt*, 49 Fed. Rep. 213; *New York* v. *Second Ave. Ry. Co.*, 55 Am. Rep. 839; *Kidd* v. *McCormick*, 83 N. Y. 391; *Brown* v. *United States*, 152 Fed. Rep. 964.

The contract with the New York Dredging Company was unenforcible against it for uncertainty and want of mutuality. 7 Am. & Eng. Encyc. of Law, 116; 9 Cyc. 248; *Pulliam* v. *Schimpf*, 19 So. Rep. 428; *Davie* v. *Lumberman's Min. Co.*, 53 N. W. Rep. 625.

The United States is seeking to enforce a unilateral contract in which it is the promisee. One party to the contract cannot be liable in damages when the other is not. 7 A. & E. Encyc. of Law, 114; 9 Cyc. 327; *Dorsey* v. *Packard*, 12 How. 126.

An agreement is not binding on either party unless both are bound. In the case at bar the United States was not bound to anything whatever. *Morrow* v. *Southern Express Co.*, 28 So. Rep. 998; *Jordan* v. *Indianapolis Water Co.*, 61 N. E. Rep. 12; *Vogel* v. *Pekoc*, 42 N. E. Rep. 386; *Crane* v. *Crane & Co.*, 105 Fed. Rep. 869.

There was no means whereby the burden on the

Dredging Company could be ascertained at all, the quantity of dredging being left absolutely to be determined by United States. *Harvester King Co.* v. *Mitchell Co.*, 89 Fed. Rep. 173; *American Cotton Oil Co.* v. *Kirk*, 68 Fed. Rep. 791; *Dennie* v. *Slyfield*, 117 Fed. Rep. 474.

The case at bar is easily distinguishable from cases cited in *Crane* v. *Crane*, 105 Fed. Rep. 869, where agreements to furnish such supplies as may be needed during a certain period for business or manufacture have been upheld.

In the case at bar the United States could vary the amount of work to be done to any extent, could vary the location of area to be dredged to any extent, and in fact, as is shown, decided to have performed only 149,000 cubic yards instead of one million, and claims that the contract is performed. *Cold Blast Transp. Co.* v. *Kansas &c. Co.*, 114 Fed. Rep. 81.

The contract was void for uncertainty and want of mutuality.

The rule that where a contract on its face assumes to provide for all the work authorized by an appropriation, the contractor is bound to know the amount of the appropriation, *Shipman* v. *United States*, 18 Ct. Cl. 146, does not apply to this case.

It would be unconscionable to hold that United States could advertise for bids for a certain work of dredging approximately one million cubic yards, so as to form a deep water basin, thirty feet deep, on a marked area; accept a bid based on that amount of work; and then hold the contractor to a contract for dredging a very much smaller quantity at the same rate because the appropriation was not sufficient to pay for the work as originally planned, for which bid was submitted.

Plaintiff in error cannot now be heard on the question of the claim for liquidated damages urged in the Circuit Court, such claim having been disallowed by that court.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a suit upon a contract for dredging and a bond made part of the contract, both executed by the New York Dredging Company as principal and by the defendants in error as sureties. The plaintiff got judgment in the Circuit Court, but in the Circuit Court of Appeals the judgment was reversed on the ground that the time for performance had been extended, and was ordered to be entered for the defendants. 167 Fed. Rep. 460. 93 C. C. A. 96. The contract provided that if, during the progress of the work, any changes in the plans or specifications should be deemed desirable by the Government, the changes in compensation should be ascertained in stated ways. The work was to begin within thirty days from the date of the contract, October 25, 1897, and to be completed in sixteen calendar months from the same date. In case of unavoidable delays, through accident, storm, or other act of Providence, the contractor was to notify the officer in charge of the occurrence &c., to provide for an investigation. In case of avoidable delays no extension of time would be recommended except on condition that the contractor bear specified costs and other expenses, to be deducted from the money coming due to it under the contract. No extension of time was to be granted except upon the authority of the Secretary of the Navy. In case of delay beyond the period fixed by the contract deductions of fifty dollars per day might be made in the discretion of the Secretary of the Navy as liquidated damages. In case of the contractor's failure in any respect to perform the contract the United States reserved the option to declare it void without prejudice to its right 'to recover for defaults herein or violations hereof,' and might recover as liquidated damages a sum equal to the penalty of the bond ($30,000).

The contractor began its preparations on the spot on

November 26, 1897, and began actual dredging in the following March. It was bound to finish by February 25, 1899. In January, 1899, it asked for an extension of time on account of storms, accidents, unforeseen hardness of material and other difficulties. On February 15 the time was extended by the Secretary of the Navy to December 30, 1899. But in about two months the contractor stopped work and asked leave to dump in deep water instead of on shore. This was refused. There were another application and refusal and further correspondence, and finally leave was granted on February 21, 1900. The contractor, however, did no more work after April, 1899. On May 25, 1901, the Navy Department declared the contract void, and a new contract was made, after advertisement in the required way, by which a third party was employed to complete the work at the lowest rate that the Government could get by such a bid. The damages allowed in the Circuit Court were the difference in cost between the old contract and the new; viz. $25,588.02 with interest, or $33,389.52 in all.

The defence is rested mainly on the extension of time, it not appearing that the sureties assented to the change otherwise than by the contract, which, it is said, merely recognizes what was true without it, that the contractor might ask for more time and the Government grant it if so minded. It is argued that the expression of the obvious does not alter the general rule of law. But the question is not what was possible but what was contemplated as not improbable, and we are of opinion that the sureties were not discharged. There is no sacrosanct prohibition of change as against them; the law has no objection to it if they assent. Whether they have done so or not is simply a question of construction and good sense, taking words and circumstances into account. If we should assume in their favor that in this case there could be no change without mutual agreement, still in our opinion this contract so

definitely contemplated what the nature of the work made manifest, that it might be necessary or very convenient to extend the time; that the sureties must be taken to have contemplated it also as permissible against themselves. In *United States* v. *Freel*, 186 U. S. 309, 317, it was recognized that a clause similar to the one to which we have referred concerning the case of the United States deeming changes desirable would authorize some changes of plan without discharging the sureties. It is true that that contract contained a proviso that no change of the kind should affect the validity of the contract, which of course it would not in any event if the contractor agreed to it. But the sureties, so far as appears, signed the bond only and were sued upon that. The proviso did not affect their case. See also *Guaranty Co.* v. *Pressed Brick Co.*, 191 U. S. 416, 424.

It is urged that the last mentioned section dealing with changes deemed desirable by the Government requires that they, as well as the increased or diminished compensation, must be agreed to in writing by the parties to the contract before they are begun; and it is suggested that this requires the consent of the sureties. We do not read it so. We think that so far as this clause goes it contemplates an imperative right on the part of the Government to make a change, but requires a writing as a condition of going on. See Rev. Stat., § 3744. The same notion is repeated in the specifications with even more definite assumption that the Government may make changes if its sees fit. "Should it be to the interest of the Government to make any changes in the plans . . . the . . . compensation is to be determined" &c. So again the Government reserves an unqualified right to change the limits of the dredging and the points of deposit. Moreover, comparing the clause with the specifications, which more or less repeat the provisions, as we have said, and deal with the contractor *eo nomine*, we should be inclined to construe

the word parties as meaning the contractor and the United States. But we do not delay upon this, as the case must be decided on the provisions dealing expressly with extension of time, and we have referred to the other clauses simply to show that in other particulars, as well as time, the sureties were going into an undertaking which was subject to contingencies of several sorts. It was limited by the appropriations available. It might be modified in plan. The limits of dredging might be changed. Necessity or convenience might require an extension of time.

We should be inclined to suppose that the extension was allowed as an unavoidable delay. But if it was allowed as an avoidable one, it does not appear that the Government did not enforce the condition as to the costs to be borne by the contractor, and if it took no steps to collect them the sureties were not concerned. The contract was not altered, and insistance by the United States would have done them no good.

The construction that we adopt is fortified by the provision for deductions of $50 per day for delay beyond the period fixed for the end of the work. For even though this fell only on the contractor it created a necessity for extension in possible cases, to which the sureties must be deemed to have assented rather than expose their principal to such a risk. Manifestly if the construction now contended for by them had been written in it would have created a strong motive against relaxations that would have let them off. We deem what we had said sufficient to justify our conclusions without considering the argument of the Solicitor General that the contractor was given a right to the extension of time if the Secretary of the Navy decided for it, and that the Secretary of the Navy is to be regarded as a third party and stranger to the contract rather than as representing the United States. See *United States* v. *Gleason*, 175 U. S. 588. Of course if the Secre-

tary be so regarded the contractor's right is made out, as the extension would be independent of the will of the other party to the contract, the United States.

The next argument that seems to us to need a word is on the effect of the election of the United States to annul the contract, as it was said. The infelicity of the word annul has been adverted to and its meaning explained heretofore. If notice had been given before the final breach and abandonment, it would have meant simply that the United States would proceed no further with the contractor under the contract, not that it rescinded or avoided it. *Philadelphia, Wilmington & Baltimore R. R. Co.* v. *Howard*, 13 How. 307, 340. *United States* v. *O'Brien*, 220 U. S. 321, 328. At the time when the notice was given it was merely a ceremony to mark the point of default as a preliminary to employing some one else. The obligations of the contract, so far as applicable to a case of default, remained in full force. The United States had a right to get some one else to complete the work and to charge the defendants with the reasonable difference in cost. Indeed this right was expressly stipulated in the specifications, if during the progress of the work a board should recommend that the contract be 'annulled' on the ground that it would not be completed in time. The cost to the United States was the least for which it could get the work done under the conditions upon which the Government was bound to contract, and must be assumed to have been reasonable in the absence of any evidence to the contrary. *New York* v. *Second Avenue R. R. Co.*, 102 N. Y. 572. *Baer* v. *Sleicher*, 153 Fed. Rep. 129. 82 C. C. A. 281. It was less than the sum stipulated as liquidated damages. *Sun Printing & Publishing Association* v. *Moore*, 183 U. S. 642. *United States* v. *Bethlehem Steel Co.*, 205 U. S. 105, 119.

The objection that the second contractor does not appear to have completed the work intended to be accomplished

by the first, that is to have made a channel of a certain depth, does not impress us. The first contract was for certain work for a certain object, but limited and subject to change as the appropriations might require. The second was for the same on the same plans and specifications, the only difference being in the parties, the price, and the liberty given to the second contractor to dump in deep water, which diminished the cost. In the first contract the Government reserved an absolute right of choice in this regard. Whether the object of the contract was attained is immaterial, so long as the work done towards it was work that the first contractor had agreed to perform.

As little need be said in answer to the argument that there was no enforcible contract for want of certainty and mutuality. The power to change details reserved by the United States did not make the contract any the worse, and there were full provisions for ascertaining a change in compensation where any such change was proper. There was nothing warranting an enlargement of the plan beyond the channel of Beaufort River, or the purpose indicated. The contract estimated the amount of material to be removed, and as there were different prices per yard for earth and rock, this amount was expressly made subject to the appropriations, as without expression would have been implied. See Rev. Stat., § 3733. There was some suggestion at the bar that the contract was not signed by the United States. The answer does not deny it, but by implication admits it. The contract says that it is made by the United States by E. O. Matthews, Chief of the Bureau of Yards and Docks, and it is signed by E. O. Matthews, Chief of the Bureau of Yards and Docks, which is enough. The matter does not seem to us to need discussion at greater length.

*Judgment of Circuit Court of Appeals reversed.*
*Judgment of Circuit Court affirmed.*